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Supreme Court, U. S.

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~~MICHAEL RODAK, JR., CLERK~~

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, ET AL.,
Petitioners,
vs.

LERoy FOUST,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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The petitioners, International Brotherhood of Electrical Workers; D. F. Jones, District Chairman, in his representative capacity; Leo Wisniski, General Chairman, in his representative capacity; and Frank T. Gladney, International Vice President in his representative capacity (Brotherhood), respectfully request that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on March 6, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 572 F.2d 710, appears in the Appendix hereto at App. 1a. A

Petition for Rehearing and Suggestion for Rehearing En Banc was denied on May 24, 1978. No opinion was rendered by the District Court for the District of Wyoming.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Does the judgment of the court below conflict with the decisions of this Court where on the evidence of record the court below affirmed the judgment of the trial court finding that:

1. The Brotherhood violated its duty of fair representation owed to the respondent Foust;
2. Compensatory damages computed on the basis of wages lost, because of his discharge were assessable against the Brotherhood, and
3. Exemplary damages were properly assessable.¹

STATEMENT OF THE CASE

This is an action in which the respondent (Foust), a former employee of the Union Pacific Railway Company (railroad) performing the duties of a Radioman, contended that the Brotherhood, his collective bargaining representative, breached its "contract" with Foust in the handling of a claim against the railroad for his alleged unlawful discharge.²

¹ While affirming the trial court's ruling allowing the jury to determine the amount of exemplary damages the court below stated that its mandate would direct the trial court to reconsider the amount of such damages it had approved, because in the judgment of the court below the amount assessed "seems high". (App. 19a).

² The trial court just prior to the issuance of instructions to the jury accepted the Brotherhood's contention that the action was

Foust was injured on March 9, 1970 while working on his railroad job, and thereafter and throughout the entire period material to this action, was physically disabled from performing the duties of his job.³ Foust retained legal counsel to handle all of his affairs because of his disability which required medical treatment, hospitalization and periodic surgery.

On February 3, 1971, the railroad notified Foust that his services were being terminated immediately as a result of his failure to comply with the rules requiring employees to request and be granted leaves of absence for medical reasons.⁴

The agreement covering Foust's employment provided a period of 60 days within which Foust or any one he selected to act on his behalf could file a claim with the railroad challenging the validity of his discharge.⁵ Fifty-

properly classed as a case involving an alleged breach of the duty of fair representation owed by a collective bargaining representative.

³ The Railroad Retirement Board granted Foust a full disability annuity, effective May 2, 1971, the benefits of which he has received since that date. Foust was not gainfully employed at any time material to this cause after incurring his injury.

⁴ Rule 23 of the collective bargaining agreement between the railroad and the Brotherhood provides as follows:

When the requirements of the service will permit, employees on request, will be granted leave of absence for a limited time, with privileges of renewal.

Failure to report for duty at the expiration of leave of absence shall terminate an employee's service and seniority, unless he presents a reasonable excuse for such failure not later than seven days after expiration of leave of absence.

⁵ Rule 21 of the agreement (Rec. Vol. IV, Exh. 10) *inter alia* states "All claims or grievances must be presented in writing . . . by or on behalf of the employee involved, to the officer of the carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based".

The Railway Labor Act, 45 U.S.C. 151 *et seq.*, provides that "All disputes between a carrier . . . and its employees shall be considered,

two (52) days after Foust was notified by the railroad of the termination of his services his legal counsel sent a letter to the District Chairman of the Brotherhood requesting his assistance in obtaining reinstatement of Foust in his former job (App. 3a note 1).

A claim on Foust's behalf was prepared and filed with the railroad by the District Chairman within ten days, a date two days after expiration of the 60-day period permitted. The claim was denied by the railroad because of its late filing and its decision was sustained finally by the National Railroad Adjustment Board. Neither the railroad nor the Board undertook an investigation into the merits of Foust's discharge.

The complaint herein was filed on April 19, 1974 seeking compensatory damages for wages "lost" by Foust (back pay) during the period February 3, 1971 (date

and, if possible, decided, . . . in conference between representatives designated and authorized to confer, respectively, by the carrier . . . and by the employees thereof interested in the dispute." (Section 2 Second, 45 U.S.C. 152, Second).

"Representatives . . . shall be designated by the respective parties" * * * * "Representatives of employees . . . need not be persons in the employ of the carrier . . ." (Section 2 Third, 45 U.S.C. 152 Third).

"The disputes between an employee . . . and a carrier . . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes. . ." (Section 3, First (i), 45 U.S.C. 153, First (i)).

"Parties may be heard either in person, by counsel, or by other representatives. . ." (Section 3, First (j), 45 U.S.C. 153, First (j)).

The individual employee's rights to participate in the processing of his grievances "are statutory rights which he may exercise independently or authorize the union to exercise in his behalf." *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 740 n. 39, adhered to on rehearing, 327 U.S. 611 (1946). *Czosek v. O'Mara*, 397 U.S. 25, 28 note 1.

of discharge) and September 25, 1973 (the significance of which date is explained *infra*), and punitive damages for "breach of contract" by the Brotherhood.

Prior thereto but subsequent to the date of his discharge, Foust on April 21, 1971 filed a complaint against the railroad seeking damages (1) for the injury he sustained during the course of his employment and (2) for his alleged unlawful discharge. On September 25, 1973, Foust's case against the railroad was settled by an agreement under which Foust received approximately \$75,000.⁶

The trial court in this case entered judgment based upon the jury's verdict awarding compensatory damages in the amount of \$40,000, computed on the basis of wages and fringe benefits relating to his former job "lost" by Foust during the period February 3, 1971 (date of discharge) to September 25, 1973 (date of his settlement with the railroad), and exemplary damages in the amount of \$75,000.

REASONS FOR GRANTING THE WRIT

The decision below raises important questions relating to the proper interpretation and application of principles established under federal labor law descriptive of the duty implied by law upon a collective bargaining repre-

⁶ On the same date, the court dismissed Foust's complaint with prejudice on the basis of the settlement reached. At an earlier date and on August 3, 1972 the court entered an order dismissing Foust's claim of unlawful discharge by the railroad because of the Adjustment Board's final denial of Foust's claim on June 2, 1972. As a condition of the settlement with the railroad, Foust executed a release which *inter alia* stated that since the date of his injury he had been "totally and permanently disabled from ever performing the duties of my employment", and that he specifically waived "any possible right of future employment with the Railroad". On the same date Foust executed a resignation from his railroad employment effective February 3, 1971 (date of his discharge). (Rec. Bro. Exhs. 19 and 2).

sentative to provide fair representation to each member of the bargaining unit.

The decision below conflicts with the decisions of this Court, and with decisions in the Tenth and other Circuit Courts of Appeals establishing the standards to be used in determining whether a collective bargaining representative has breached its duty. It appears to be the first such decision in the Tenth Circuit involving parties whose relationship is governed by the Railway Labor Act.

The decision below conflicts with the decisions of this Court, and with those in the Tenth and other circuits establishing the procedures and standards to be used in the allocation of damages in a fair representation case involving an alleged unlawful discharge.

The decision below conflicts with decisions of this Court and those in the Tenth and other circuits on the assessability of punitive damages against a union representative in a fair representation case.

Review by the Court is required also to assure the maintenance of uniformity in decisions of the courts of appeals in the adjudication of fair representation disputes.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ESTABLISHING THE STANDARDS TO BE USED IN DETERMINING WHETHER A COLLECTIVE BARGAINING REPRESENTATIVE HAS BREACHED ITS DUTY OF FAIR REPRESENTATION OWED TO A MEMBER OF THE BARGAINING UNIT.

In affirming the trial court's judgment that the Brotherhood breached its duty of fair representation the court below purported to endorse the decision in *Vaca v. Sipes*, 386 U.S. 171, stating that it established the principle

that a union would violate its duty to a claimant if it ignored his claim or if it processed a meritorious grievance in a perfunctory manner (App. 9a). It found that the instruction given the jury by the trial court adhered to this characterization of the decision in *Vaca*.

The court below in affirming the judgment of the trial court rejected the standards explicitly set forth in the decisions of this Court in *Humphrey v. Moore*, 375 U.S. 335, 348, in *Amalgamated Association of Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299, 301, and in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-571.

In *Moore* the Court ruled there is no violation of the duty in the absence of substantial evidence of fraud, deceitful action, or dishonest conduct on the part of the union representative.

In *Lockridge* the Court ruled that to prove a breach there must be proof "of arbitrary or bad-faith conduct on the part of the Union", (*Vaca*), and "substantial evidence of fraud, deceitful action or dishonest conduct," (*Moore*), and "substantial evidence of discrimination which is intentional, severe, and unrelated to legitimate union objectives. A showing of "honest, mistaken conduct" was viewed as not enough.

In *Hines*, the Court explained in referring to *Vaca*, that the union's duty was to represent employees "honestly and in good faith and without invidious discrimination or arbitrary conduct."

The court below ruled that the Brotherhood's "perfunctory" handling of the claim was shown by its indulging in "needless correspondence back and forth and insisting that they have an authorization from the plaintiff with respect to [his] representation by the attorney who was seeking" the assistance of the Brotherhood on behalf

of Foust, as well as the fact that General Chairman "Wisniski became a part of the machinery that was used and this delayed the ultimate filing".⁷

The court below is shown to have refused to heed (although so urged by the Brotherhood) the principles established by the Court's decisions in *Elgin, J. & E. Ry. Co. v. Burley*,⁸ that the Railway Labor Act gives the claiming employee the right to control the handling of his grievance, and the necessity for the union to be "authorized" to handle a claim. The evidence established that at no time did Foust personally request the Brotherhood to file a grievance on his behalf or inform the Brotherhood that his legal counsel was authorized to handle his discharge claim.

The decisions of the Court from *Steele*⁹ through *Hines*¹⁰ describe the nature of the duty owed by a representative to a claiming employee. The decisions establish and reiterate that there must be substantial evidence showing that the conduct of the union was motivated by some "animus". Negligence, bad judgment, ineptitude, and the like, not reflecting a dishonest or hostile purpose, do not constitute a sufficient basis for a finding of a breach of the duty. The jury, and successively the trial and reviewing court, appear to have been erroneously influenced solely by the late filing of the claim. The fact that the Brotherhood failed to timely file the claim "despite the shortness of time"¹¹, possesses no legal signifi-

⁷ The opinion of the court below (App. 3a-6a) in part described the procedure followed by the District Chairman in requesting guidance and instructions with respect to the filing of the claim.

⁸ See note 5 *supra* herein, page 4.

⁹ 323 U.S. 192, 204.

¹⁰ 424 U.S. 554, 556.

¹¹ The court below conceded that the time permitted for the Brotherhood to file the claim was "limited" and "short" (App. 10a,

cance, in the absence of evidence disclosing a dishonest or deceitful purpose.¹²

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ESTABLISHING THE STANDARDS AND PROCEDURES TO BE USED IN THE ALLOCATION OF DAMAGES IN A FAIR REPRESENTATION CASE INVOLVING AN ALLEGED WRONGFUL DISCHARGE.

The court below (App. 7a) found that the jury was instructed that it must ignore the wrongful discharge by the railroad as a source of damage, and that a claim against the Brotherhood for breach of duty of fair rep-

11a) and not the 60-day period provided in the agreement, but an 8-day period allowed by Foust's legal representative.

¹² In general, see *DeBoles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1013-1020 (3rd Cir. 1977). The decision below conflicts with the standards applied in the following cases among others in the Circuit courts: *Simberlund v. Long Island R.R. Co.*, 421 F.2d 1219, 1225 (2nd Cir. 1970); *Jackson v. Trans World Airways*, 457 F.2d 202 (2nd Cir. 1972); *Gainey v. Bro. of Ry. Clerks*, 313 F.2d 318, 323 (3rd Cir. 1963); *Bazarte v. U.T.U.*, 429 F.2d 868 (3rd Cir. 1970); *Balowski v. International Union, et al.*, 372 F.2d 825, 834-835 (6th Cir. 1967); *Dente v. Masters, Mates & Pilots Local 90*, 492 F.2d 10 (9th Cir. 1973); and with the following decisions in the Tenth Circuit: *Patterson v. Tulsa Local No. 513*, 446 F.2d 205 (1971) cert. denied 405 U.S. 976 (1972); *Reid v. Int'l. Union, Wtd. A.A.&A. Imp. Wkrs.*, 479 F.2d 517 (1973) cert. denied, 414 U.S. 1076; and *Woods v. North American Rockwell Corp.*, 480 F.2d 644 (1973). Compare *Beriault v. Local 40 ILWU*, 501 F.2d 258 (9th Cir. 1974); and *Sanderson v. Ford Motor Co.*, 483 F.2d 102, 110 (5th Cir. 1973).

The court below is shown also to rely on *Ruzicka v. General Motors Co.*, 523 F.2d 306 (6th Cir. 1975). Although so urged on rehearing, it appears to have attributed no significance in the fact that the Sixth Circuit on rehearing (unreported) in *Ruzicka* had limited and modified its earlier ruling so as to apply only to fair representation cases where the union representative had exclusive control of the grievance procedures.

resentation was a separate and distinct claim from one contending an alleged wrongful discharge.¹³

The instructions given the jury, as described above, were in accord with the rulings of the Court in *Vaca*, in *Czosek*, and in *Hines, supra*. Collectively these cases establish the principle that in an action involving an alleged wrongful discharge and a claimed breach of fair representation, and whether or not the employer and the Union both are parties, the damages properly assessable against the employer are those associated with the alleged unlawful discharge, and those properly chargeable to the union are the "incremental damages", if any, occasioned by the breach of duty by the bargaining representative.

Although so instructed it is clear from the verdict rendered by the jury and affirmed by the courts below that the jury failed to follow such instructions. This error by the jury should have been evident to (and corrected by) the court below because of its finding that (App. 16a-17a) the

only tangible evidence in the record is for lost wages, which would be based on his [Foust's] continuing to have his old job. Although he testified as to loss of

¹³ The court below also found that (App. 8a):

Emphasis was placed [by the trial court] on the need for the jury to find, in order for the plaintiff to recover, that the action of the *Union* caused damage to him independent of any action which the *Union Pacific* may have taken.

The court below also found (App. 14a) that:

The [trial] court first told the jury that it was to ignore any evidence relating to whether or not the plaintiff was wrongfully discharged from employment by the *Union Pacific Railroad Company*. The defendant *Union* and its representatives did not participate in any aspect of that decision and there is no charge in the Complaint involving the *Union* in regard to whether or not the Plaintiff had or had not observed the rules of the carrier which were stated as a basis for the termination of his employment by the railroad.

seniority together with insurance and other fringe benefits, there was a lack of evidence as to the reasonable value of these items. He did testify as to loss of \$1,000 for medical costs resulting from lost insurance.

The court below (App. 17a including note 2) noted also that the Brotherhood had argued that Foust

should not have damages based upon his pay at the old job because he would not have been performing it due to his injury. He had a disability which prevented him from performing his job as a radioman.¹⁴ No doubt he was unable to testify as to the wages he would receive had he retained his status and been given another job. The only standard that he had to offer was his pay that he had been receiving. Undoubtedly, his loss of fringe benefits was worth something, but from the record we are not able to say what their worth was. Nor can we say that the jury's conclusion was wrong.

The analysis by the court below of the nature of the evidence of record "supporting" Foust's claim for compensatory damages requires the conclusion that such evidence related solely to wages and fringe benefits applicable to Foust's former employment with the railroad. His wages and benefits were regarded as "lost" because of Foust's "presumed" unlawful discharge by the railroad.¹⁵

¹⁴ Such was the meager "recognition" by the court below that the jury verdict awarded compensatory damages for wages lost by a claimant who was totally unable to earn them because of his physical disabilities.

The indulgence by the court below that lost wages were assessable against the Brotherhood was clearly erroneous also in the absence of any determination by any tribunal establishing the merits of Foust's discharge. See *Vaca*, 386 U.S. 171, 197-198; *Czosek*, 397 U.S. 25, 29; and *Hines*, 424 U.S. 554, 570.

¹⁵ It would seem unnecessary to reiterate what the Court said in *Vaca* and *Hines* to the point that absent a clear showing of un-

Vaca, Czosek (a case strikingly similar to the instant case), and *Hines* clearly establish that damages relating to an alleged wrongful discharge are not properly assessable against the Union charged with a related breach of fair representation.¹⁶

lawful discharge there can be no damages assessable against an employer or a union.

The *Vaca Court*, 386 U.S. 171, 196, suggested a variety of procedures that could be followed by a trial court when presented with a fair representation case involving an alleged wrongful discharge as to which there had been no prior determination of its lawfulness, in order to properly adjudicate the rights of all parties. Clearly, the procedures recommended were not pursued by the trial court below.

¹⁶ In *Vaca* (386 U.S. at 196-197) the Court said

... what portion of the employee's damages may be charged to the union: in particular, may an award against a union include, as it did here, damages attributable solely to the employer's breach of contract? We think not. Though the union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which triggered the controversy and which caused this portion of the employee's damages. . . . The governing principle then is to apportion liability between the employer and the union according to the damage caused by the fault of each.

In *Czosek* (397 U.S. at p. 29) the Court in part said:

Assuming a wrongful discharge by the employer independent of any discriminatory conduct of the union and subsequent discriminatory refusal by the union to process grievances based on the discharge, damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievance added to the difficulty and the expense of collecting from the employer. If both the union and the employer have independently caused damage to employees, the union can not complain if separate actions are brought against it and the employer for the portion of the total damages caused by each.

In *Hines* (424 U.S. at p. 570) the Court said:

To prevail against either the company or the union petitioners [the employees] must show not only that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the union.

It is clear that the "fears" of the petitioning unions in *Czosek* (397 U.S. at page 25) that "if sued alone they may be forced to pay damages for which the employer is wholly or partly responsible . . ." which this Court said were "groundless", became a reality for the petitioning Brotherhood here by the decision below.

Further, the court's description of the evidence of record on the nature of the damages "suffered" by Foust requires the conclusion that there was no material evidence to show that Foust incurred damages in any amount as a result of the alleged breach of fair representation by the Brotherhood.

III. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT ON THE ASSESSABILITY OF EXEMPLARY DAMAGES AGAINST A BARGAINING REPRESENTATIVE IN FAIR REPRESENTATION CASES.

The court below affirmed the judgment of the trial court with the exception of the amount of the award of exemplary damages. It directed the trial court on remand to reconsider the amount of such damages awarded in order to determine whether they were excessive. It was the view of the court below that the amount of \$75,000 "seems high".

The court below correctly noted that the Brotherhood persistently contended that this was not a proper case for an award of exemplary damages in any amount (App. 17a). The court below also correctly noted that the Brotherhood relied on the Court's decision in *Vaca, supra*, 386 U.S. at page 195 which held that under the circumstances of that case neither compensatory nor punitive damages were proper. Such was the contention of the Brotherhood throughout this case.

Expressed in simple terms, compensatory damages are awarded to reimburse a plaintiff for losses sustained.

Exemplary or punitive damages have been found to be assessable as a punishment to deter a wrongdoer from misconduct found to be wanton or reckless or to prevent industrial strife. (*DeBoles, supra* at page 1019).

We have presented our argument that compensatory damages were not properly assessable against the Brotherhood because of its lack of participation in the action causing Foust's discharge and resulting in his claimed "losses" in wages and fringe benefits. That argument spills over into the question of assessing punitive damages against the Brotherhood. Clearly, if the Brotherhood did not participate in any action causing injury to Foust, it should not be assessed damages of any nature. In the absence of such injury at the hands of the Brotherhood, any remedy against it would necessarily be a "punishment" for a harmless lie.

Punitive damages have consistently been rejected by the federal courts under the related statutory provisions of Section 301 of the Labor Management Relations Act, 29 U.S.C. 185. *DeBoles, supra* (page 1019), expresses the general policy of the federal labor laws to be to furnish remedies rather than punishments. Inasmuch as the Railway Labor Act was the statute under which the decisions establishing this doctrine arose, the rulings of this Court and the circuit courts in this regard under the LMRA must be deemed to be applicable to fair representation cases arising under the Railway Labor Act.

The decision of the court below on the question of punitive damages is shown also to reject *Vaca* as not being persuasive, as well as to conflict with the decision in the Third Circuit in *DeBoles, supra*, and the decision of the Eighth Circuit in *Butler v. Local Union 823, Teamsters*, 514 F.2d 442, 454 (1975).¹⁷ It purports to rely solely

¹⁷ In *Butler* (at page 454), the Eighth Circuit, in part, said in denying punitive damages:

[Footnote continued on page 15]

upon the decision of the Fourth Circuit in *Harrison v. United Transportation Union*, 530 F.2d 558 (1975), cert. denied 425 U.S. 958.

The Brotherhood believes that the Court will find that facts in *Harrison* are inapposite and its legal reasoning unpersuasive within the context of this case.

The court below expressed the view that "wanton conduct or reckless disregard for the rights of an employee is sufficient to justify a jury's consideration of exemplary damages". We do not believe it necessary to argue this point in consideration of the fact that the record will not support a characterization of the conduct of the Brotherhood in such terms.

The Brotherhood submits that controlling legal precedents demonstrate that permitting the jury to rule on any measure of exemplary damages was error on the part of the trial court which was not corrected by the court below.

Finally, it is submitted that the decision below, if allowed to stand, will impair substantially uniformity in the decisions of the Circuit Courts, and cause an erosion

¹⁷ [Continued]

The Local's conduct was not the type of outrageous or extraordinary conduct for which extraordinary remedies are needed Butler [the employee] was not subjected to threats of violence, harassment, physical abuse or the scorn or ridicule of his co-workers, and there was no showing that the Local acted with any malice directed specifically at him.

The decision also conflicts with the rationale of *Williams v. Pacific Maritime Assn.*, 421 F.2d 1287, 1289 (9th Cir. 1970) when the court in finding that punitive damages were not properly assessable in a case charging that conspiracy among union officers had caused plaintiff's discharge, stated: ". . . punitive damages cannot be awarded for grievances of this nature under federal labor law". Accord: *Crawford v. Pittsburgh-Des Moines Steel Co.*, 386 F.Supp. 290, 294-295 (Wyo. 1974). See *Pearson v. Western Electric Co.*, 542 F.2d 1150 (10th Cir. 1976).

of fundamental principles inherent in federal labor law policy. It is respectfully submitted that the failure of the court below to apply applicable principles of law established by the decisions of this Court requires that the Court grant certiorari, and justifies summary reversal of the decision below, and the issuance of a mandate directing the trial court to dismiss this cause of action.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the court below.

Respectfully submitted,

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APPENDIX

OPINION OF COURT OF APPEALS
UNITED STATES COURT OF APPEALS
For The Tenth Circuit

(Submitted January 23, 1978 Decided March 6, 1978)

Docket No. 76-1951

LEROY FOUST,
Plaintiff-Appellee

—v—

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
D. C. JONES, District Chairman, in his representative
capacity, LEO WISNISKI, General Chairman, in his rep-
resentative capacity, and FRANK T. GLADNEY, Interna-
tional Vice President, in his representative capacity,
Defendants-Appellants.

Before:

Holloway, Barrett and Doyle, Circuit Judges.

The International Brotherhood of Electrical Workers, defendant-appellant herein, seeks reversal of a judgment of the United States District Court for the District of Wyoming, which was based on a jury verdict holding the Brotherhood liable for breach of duty to fairly repre-
sent plaintiff-appellee Leroy Foust in grievance proceed-
ings addressed to the Union Pacific Railroad and ultim-
ately to the Railway Adjustment Board. The judgment of the district court was in favor of Foust and included an award of \$40,000 actual damages and \$75,000 punitive damages. The crucial question on this appeal is whether the evidence supports the judgment based upon

breach on the part of the Brotherhood of a duty owed to Foust, a member of the Union.

Foust was a radioman, who had been employed by Union Pacific Railroad and had been a member of the International Brotherhood of Electrical Workers, which organization was his collective bargaining representative while he was employed by the railroad. The individual defendants herein are the officers of the Union. The injury to Foust occurred on March 9, 1970, while he was on the job. He had a claim against the railroad under the Federal Employer's Liability Act, which claim was settled on September 25, 1973. The settlement provided for payment of \$75,000 to Foust less \$2,600 in sickness benefits. He waived future right of employment and any claim that he might have had for alleged wrongful discharge against the railroad.

His second claim was that which had arisen as a result of the railroad company terminating his employment. A release was given with respect to this when he received the \$75,000 settlement.

The claim in the instant case is against the Union and is based on its alleged failure to represent him fairly in the proceedings having to do with his grievance which grew out of the termination of his employment by the Union Pacific Railroad Company.

Our main concern is, therefore, whether the proof at trial was legally sufficient to establish a claim that the Union violated a legal duty to represent him, supported by sufficient evidence.

After his injury on March 9, 1970, Foust went on leave of absence from his job in order to obtain medical treatment for his injured back.

The rules in the Collective Bargaining Agreement provided for an employee to file a request for a leave

of absence for a limited period of time with rights of renewal on request. Based upon Rule 23(b) of the Collective Bargaining Agreement, he must apply for leave of absence at the peril of being terminated. The Agreement provides:

Failure to report for duty at the expiration of leave of absence shall terminate an employee's service and seniority, unless he presents a reasonable excuse for such failure not later than seven days after expiration of leave of absence.

On January 12, 1971, Union Pacific advised Foust by letter that his current leave of absence had expired December 22, 1970; that they had not heard from him; and that it was necessary that a proper request for an extension accompanied by a statement from his doctor be furnished. On January 21, 1971, Foust's then attorney informed the railroad that Foust had filed a request for extension in December and asked whether it had been received and, if not, what forms were needed.

The railroad responded on January 25, 1971, advising the attorney that it still did not have a physician's statement and that when one was received Foust's request for leave would be considered. However, on February 3, the railroad wrote to Foust and advised him that he was being terminated for failure to request an extension prior to expiration of his leave and for failure to furnish a statement from his doctor as to the necessity for additional leave.

Foust's attorney contacted the railroad in an attempt to get the decision to discharge Foust reversed. On March 26, 51 days after the date of discharge, he wrote to one Dean Jones, District Chairman of the Brotherhood.¹ This letter was received Saturday, March 27.

¹ Dean Jones was the appropriate officer of the Union for the lodging of the claimed grievance. There was some confusion, which appeared in one paragraph of the letter. This resulted from the

statement that the writer believed that Jones was acting on behalf of the carrier. It was very clear that he was communicating with the Brotherhood and was requested that he act on his behalf. The letter said:

We have been informed that you are the officer of the carrier authorized to receive grievances under Rule 21 of the agreement between the Union Pacific Railroad and System Federation No. 105, International Brotherhood of Electrical Workers, dated April 1, 1957. If you are not the officer so authorized under Rule 21 would you please, in your official capacity as union representative of Mr. Foust, please inform us by return mail who is the officer of the carrier authorized to receive grievances and also, please forward on to him this written grievance claim which we are submitting pursuant to Rule 21.

On February 5, 1971, Mr. L. D. Foust received a letter from Mr. C. O. Jett, a carbon of which was sent to Mr. Leo Wisniski, General Chairman of the I.B.E.W., which terminated Mr. Foust's services with the Union Pacific Railroad. A copy of this letter is attached. It is Mr. Foust's contention that his termination was in clear violation of the agreement between the Union Pacific Railroad and the International Brotherhood of Electrical Workers. Mr. Foust has complied with Rule 25 of said agreement which deals with personal injury. He has filed all papers requested of him by the Union Pacific Railroad. His doctor, Doctor Taylor, has kept the Union Pacific informed as to Mr. Foust's medical progress. Dr. Taylor is a Union Pacific doctor.

Pursuant to Rule 21 Mr. Foust is making this written report of his grievance claim and hereby requesting the International Brotherhood of Electrical Workers to do everything within their power to enable Mr. Foust to be re-enstated as an employee of the Union Pacific Railroad without any loss of wages or loss of seniority. The action of Mr. C. O. Jett was completely arbitrary and capricious, without proper foundation. We will be more than happy to supply you with any and all information we have concerning this incident to assist you in the investigation of this matter.

A carbon of this letter is being sent to Mr. Wisniski and to the President of the International Brotherhood of Electrical Workers to insure that proper notification is given to the union pursuant to Rule 21 and also enter an attempt to help to expedite this matter.

As you are well aware, Mr. Foust filed another claim with you on June 17, 1970 in regards to a union agreement violation that came to his knowledge in late May, 1970. According to Rule 21, paragraph one, all claims not disallowed within 60

Thereupon, Jones contacted the General Chairman of the Systems Council in Omaha, Leo Wisniski. Wisniski prepared a letter which was sent first to Jones in Omaha, and then sent to Foust with Jones' signature. This was dated April 5. It acknowledged receipt of the letter from Foust's lawyer. It explained that Rule 21 of the Collective Bargaining Agreement required a grievance to be presented in writing by or on behalf of the employee involved. The necessity to receive a written authority to handle claims or grievances on behalf of an employee was explained. The letter went on to say that: "... Upon receipt of your grievance in writing, and request to the undersigned to handle your initial claim pertaining to the Carrier terminating your service, it will be reviewed and handled under the proper grievance procedures . . ."

days are to be deemed allowed. Mr. Foust to this date has never received any correspondence from you in regards to this claim that he filed on June 17, 1970. You informed him in December by telephone that the union was not going to do anything in regards to his claim due to the fact that he had retained our law firm to assist him in his personal injury claim against the Union Pacific Railroad. For your knowledge and for the knowledge of Mr. Wisniski, who I understand gave you this information to convey to Mr. Foust, Mr. Foust did not retain our firm until late November, 1970, long after the 60 day claim period had expired. We would appreciate some acknowledgment of his claim we are herewith filing and appreciate any and all support the union can give Mr. Foust in regards to this matter. As I indicated to you in our letter of January 21, 1971, Mr. Foust is presently and has always been a strong union man. He looks towards the union for security and backing but is becoming very dishearten [sic] by the unions lack of cooperation.

If I can assist you in anyway or if you require any information from Mr. Foust in regards to this claim, please let me know at your early convenience.

There is little reason for misunderstanding by the Brotherhood as to what was intended here.

Jones filed a claim on Foust's behalf, but did not do so before April 6, which was two days after the deadline. The claim letter was prepared by Wisniski in Omaha and was mailed to Jones in Rawlins, Wyoming, and then sent by Jones to the railroad officer in Omaha. It is not surprising that this claim was denied because of its not having been timely filed. The Union appealed this decision, but it was finally denied by the Railway Board of Adjustments as having been filed two days late.

The issues which are advanced on behalf of the International Brotherhood, defendant-appellant, as a basis for reversal include:

1. The alleged error of the trial court in upholding a verdict, the effect of which was to hold the Brotherhood liable for breach of a duty owed to Foust to represent him.
2. The alleged error of the court in failing to set aside the jury verdict granting, first, compensatory damages in the amount of \$40,000, and, secondly, punitive damages in the amount of \$75,000.
3. The alleged error of the court in allowing the case to be tried by a jury and its having failed to grant a motion for directed verdict.
4. The error of the court in failing to dismiss the case because of the neglect of Foust to pursue and exhaust his administrative remedies.

I.

DID THE TRIAL COURT ERR IN ITS FORMULATION AND SUBMISSION TO THE JURY OR THE STANDARDS WHICH IT DEEMED APPLICABLE?

The court in its charge to the jury explained the plaintiff's theory of recovery as having arisen from his wrongful discharge on February 3, 1971, by the Union Pacific Railroad for having failed to file for a continued leave of absence. The court explained that under Rule 21 of the Collective Bargaining Agreement between the Union and the Union Pacific Railroad Company, a notice of grievance was required to be filed within 60 days of the date that the grievance occurred, the grievance here being the alleged unlawful discharge. Plaintiff's contention was explained as the Union's failure to file the grievance within the 60-day period, notwithstanding his request within the 60-day period and resulting in denial by the Board of Adjustment (which functions under the Railway Labor Act). The court further said that the allegation of plaintiff was that the Union was guilty of gross nonfeasance and hostile discrimination in arbitrarily and capriciously refusing to process the plaintiff's grievance and in refusing to file it timely.

The issues for the jury to determine were, first, whether the defendant Union was obliged to represent the plaintiff at grievance procedures with the Union Pacific; second, whether failure to represent breached a duty owed the plaintiff to represent him fairly in grievance procedures; third, whether the Union was guilty of gross nonfeasance, hostile discrimination and arbitrary and capricious failure to process the grievance and, finally, whether plaintiff was damaged by this failure.

The jury was also told that it must ignore the wrongful discharge by the Union Pacific Company as a source

of damage; that a claim against the Brotherhood for breach of a duty of fair representation was a separate and distinct claim from his wrongful discharge at the hands of Union Pacific.

Emphasis was placed on the need for the jury to find, in order for the plaintiff to recover, that the action of the *Union* caused damage to him independent of any action which the Union Pacific may have taken. The jury was told that the essential legal standard which the evidence had to satisfy was arbitrariness and capriciousness of the Union; that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory manner. Arbitrary and capricious were said to be synonymous and were defined as an act done without adequate principle or an act not done according to reason and judgment. Arbitrary or capricious were defined as requiring judgment on the basis of whether the act complained of is reasonable or unreasonable under the circumstances. Bad faith was described as implying a breach of faith.

It would seem that the source of the Union's obligation to represent the member of the Union arises under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, plus the Collective Bargaining Agreement between the Union and the Union Pacific. Sections (1) and (3)(c) of Rule 21 recognize the right of representatives of organizations to file and prosecute claims and grievances for and on behalf of the employee they represent. From the fact that the Union is exclusive bargaining representative under the Railway Labor Act, and from the recognition further of the union in the Collective Bargaining Agreement, the case law as to the duty of the unions to fairly represent the employees has emerged.

The Supreme Court considered the scope of the duty in *Vaca v. Sipes*, 386 U.S. 171 (1967). There a worker

challenged the union's decision not to appeal his grievance to arbitration. The Supreme Court held that there was no breach of duty by the union in thus exercising its discretion; that it had the right to make an evaluation of the merits of the grievance and to make a decision as to whether it was worthy of an appeal. But, at the same time, the Court fully recognized that the union could have violated its duty to the claimant had it ignored the worker's complaint or if it had processed the grievance in a perfunctory manner.

In giving its charge the trial court adhered to the decision and language of *Vaca*.

The Union seeks recognition of a more narrow standard that was enunciated by the Supreme Court in *Amalgamated Ass'n of Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971). The Court in that case spoke of the necessity for showing evidence of fraud, deceitful action or dishonest conduct. See 403 U.S. at 299. It also said that there must be evidence of discrimination which is intentional, severe and unrelated to legitimate union objectives. See 403 U.S. at 301.

Subsequently, in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), the Supreme Court quoted with approval its prior discussion contained in *Vaca*. In *Hines*, the plaintiffs had been discharged for dishonesty and subsequently discovered evidence that showed they had probably been innocent. The allegation by them was that the union had failed to adequately investigate the charges and had presented no favorable evidence at arbitration. The Court cited *Vaca*, stating that the union cannot ignore a meritorious grievance or process it in a perfunctory manner. It ruled that the allegation contained in *Hines* stated a claim for breach of duty of fair representation, noting, however, that "arbitrary" conduct calls for more than "mere errors in judgment." 424 U.S. at 571.

In *Reid v. International U., U.A.W.*, 479 F.2d 517 (10th Cir. 1973), *cert. denied*, 414 U.S. 1076 (1973), this court cited the language contained in both *Vaca* and *Lockridge*. In *Woods v. North American Rockwell Corp.*, 480 F.2d 644 (10th Cir. 1973), we stated that the duty included an "obligation to avoid arbitrary conduct."

In the case at bar the violation of duty relied upon was the failure of the Union to act within the time provided in the Collective Bargaining Agreement. True, the time available to the Union was limited. This, however, does not excuse their having needless correspondence back and forth and insisting that they have an authorization from the plaintiff with respect to representation by the attorney who is seeking to get them to act.

We are of the opinion that the court's charge to the jury constituted a correct selection of standards and a proper statement of the applicable law as to the duty of fair representation.

II.

WAS THE EVIDENCE LEGALLY SUFFICIENT AND DID IT SUPPORT THE STANDARD?

The grievance was filed out of time, and it was because of this that the Board denied it. In *Ruzicka v. General Motors Corp.*, 523 F.2d 306 (6th Cir. 1975), evidence that the union inexplicably, without making a determination as to its merits, allowed the deadline for taking the case to arbitration to lapse, was sufficient to support a verdict of breach of duty. In *Griffin v. International U., U.A.W.* 469 F.2d 181 (4th Cir. 1972), the court stated that a union could not refuse to process a grievance without reasons. The First Circuit in *De Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970), held that the failure to investigate the merits of a griev-

ance could be arbitrary conduct and a breach of duty. In accord is *Hughes v. International Bro. of Teamsters, Local 683*, 554 F.2d 365 (9th Cir. 1977).

In our opinion the evidence adduced as to the perfunctory manner of handling the claim was sufficient justification for the submission of the issue of breach of duty to the jury. The Union filed the grievance out of time and it was due to this that the Board denied it. The evidence, in addition to that just mentioned, showed that there had been an earlier effort on the part of Foust to file a claim for wages while he was attending physical therapy sessions. The Union apparently believed that this was cognizable under the Federal Employees' Liability Act, but made little effort to clarify the matter. This serves to give character to the subsequent failure of the Union to pursue the claim in question despite the fact that it had full knowledge of the 60-day limit. At no time did Jones or Wisniski seek to contact Foust by telephone. Instead, despite the shortness of time, they insisted that Foust *personally* submit the claim to them. This message was contained in a letter prepared in Omaha, mailed to Rawlins and then mailed to Foust the day after the time for submitting a claim had passed. None of this was necessary. Ordinarily Jones would have been the person to handle a grievance, but Wisniski became a part of the machinery that was used and this delayed the ultimate filing. The jury could consider this as arbitrary, unreasonable and a breach of duty.

III.

DID THE TRIAL COURT ERR IN REFUSING TO DISMISS THE FOUST COMPLAINT BECAUSE OF FAILURE TO EXHAUST INTERNAL UNION REMEDIES?

This contention rests on Article XXVII, Section 12 of the Union's Constitution, which reads:

Sec. 12. Any member who claims an injustice has been done him by any L.U. [local union] or trial board, or by any Railroad Council, may appeal to the I.V.P. any time within forty-five (45) days after the date of the action complained of. If the appeal is from an action of a railroad local union, or a Railroad Council, it must go to the I.V.P. in charge of railroad matters.

The complaint is that no charge was filed by Foust with the International Vice President of the Union. The Constitution is not before us.

The case of *Imel v. Zohn Mfg. Co.*, 481 F.2d 181 (10th Cir. 1973), recognized that exhaustion of intra-union remedies is ordinarily required. There the local had refused to process plaintiff's grievance. The Constitution specifically provided for an expedited appeal and required that this be followed before a member was free to sue the union. We there said:

The by-passing of the carefully enunciated review measures, absent a clear and positive showing of futility, can ~~only~~ promote disharmony in the field of labor-management relations. 481 F.2d at 184.

The cases hold that a prerequisite to the type of suit which is before us is that there be at least some effort to avail oneself of internal remedies. *See, e.g., Harrison v. Chrysler Corp.*, 558 F.2d 273 (7th Cir. 1977); *Ruzicka v. General Motors Corp.*, 523 F.2d 306 (6th Cir. 1975); *Mills v. Long I. R. Co.*, 515 F.2d 181 (2d Cir. 1975).

The Supreme Court held in *Glover v. St. Louis-S.F. Ry. Co.*, 393 U.S. 324 (1969), that a minority member who claimed racial discrimination was excused from the exhaustion requirement based on futility, where the evidence was insufficient that the internal remedies would prove adequate. *See Retana v. Apt., Motel, Hotel & El. Op. U.*

453 F.2d 1018 (9th Cir. 1972). The worker there was unable to speak English and had repeatedly sought union help without result. Perhaps this is another way of arriving at the conclusion that it would be futile. There are other cases that hold that a showing of futility or inadequacy or likelihood of bias will excuse failure to exhaust. *See Calagaz v. Calhoon*, 309 F.2d 248, 259-60 (5th Cir. 1962); *Patterson v. Bialystoker & Bikur Cholim, Inc.*, 81 C.C.H. Lab. Cas. ¶ 13,251 (S.D.N.Y. 1977); *Cefalo v. International U. of Dist. 50, U.M.W.*, 311 F. Supp. 946, 953 (D.D.C. 1970).

There is no evidence from which we could conclude that the appeal to the International Vice President in charge of railroad matters would have been availing. Finally, considering that the present suit is for damages and not for reversal of a decision of a union officer and has been tried and appealed, it would be a strange result to now say that it is defective because of failure to first appeal to the Vice President.

Judging from the nature and character of this claim, there seems little likelihood that the Union would have acted in an effort to compensate Foust for the failure. Moreover, the Union did little to bring this question to the attention of the trial court. For these reasons, it does not loom large as a defense to a verdict following a complete trial.

In reaching this conclusion, we are not denying the policy which favors making every effort to obtain a settlement of intra-union disputes.

IV.

DOES THE FACT THAT THE UNION WAS NOT THE SOLE AGENCY FOR PRESENTING GRIEVANCES ALTER THE EXISTENCE OF ITS DUTY?

The Union argues that since Foust had the right under the Railway Labor Act and the Collective Bargaining Agreement to file the grievance himself, this undermines the existence of a duty on the part of the Union to initiate the grievance. However, *Conley v. Gibson*, 355 U.S. 41, 47 (1957), held that this fact did not excuse the union's racial discrimination in refusing to represent employees. The Supreme Court reasoned that the bargaining power of the union was much greater than that of an individual or a small group.

Some courts have not allowed the union to make the employee's right to assert his own grievance a defense where the employee has committed his grievance to the hands of the union and has relied on the union effort. *See Harrison v. United Transport U.*, 530 F.2d 558 (4th Cir.), *cert. denied*, 425 U.S. 958 (1976); *Schum v. South Buffalo Ry. Co.*, 496 F.2d 328 (2d Cir. 1974); *Browning v. General Motors Corp., Fisher Body Div.*, 387 F. Supp. 985 (S.D. Ohio 1974). Having undertaken to act affirmatively on behalf of Foust, the Union is precluded from escaping responsibility by asserting that Foust could or should have presented the grievance rather than depend on it.

V.

DID THE COURT CORRECTLY INSTRUCT THE JURY ON THE QUESTION OF CAUSATION?

The court first told the jury that it was "to ignore any evidence relating to whether or not the plaintiff was wrongfully discharged from employment by the Union

Pacific Railroad Company. The defendant Union and its representatives did not participate in any aspect of that decision and there is no charge in the Complaint involving the Union in regard to whether or not the Plaintiff had or had not observed the rules of the carrier which were stated as a basis for the termination of his employment by the railroad."

There is a dictum in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570 (1976), which says that in an action against the employer and the union jointly, wrongful discharge is an ingredient of the action. The case at bar was tried on the theory that wrongful discharge was not a necessary element. The union itself consented to the court's instruction that the wrongful discharge suit and the fair representation action were distinct and separate, one against the railroad and one against the Union. Bearing in mind that this was not an action against both employer and Union, we view the trial court's instruction as to the separateness of the claims to be valid. From a further instruction of the trial court this is very clear:

You are also instructed that a claim by a former Union member against a Union for breach of its duty of fair representation is a separate and distinct claim which the member has and is apart from any right which the employee may have or may have had against his employer. Thus, if you find from a preponderance of the evidence that the actions of the Union have caused damage to the Plaintiff independent of any actions which the employer may have taken, you may award such damages as the evidence shows the Plaintiff incurred.

The court was saying that in a suit against the employer the essence of it would be wrongful discharge. Here, as to the Union, the court told the jury that

there must have been an injury independent of any action on the part of the employer.

It is conceivable that wrongful discharge could be looked to in a fair representation suit against the Union alone. Where this is true an inference of wrongful discharge could be drawn from the circumstances surrounding the termination and the fact that he was terminated with loss of not only his job but his incidental rights, merely because he failed to specifically apply for an extension of his leave of absence. However, we need not and we do not reach this issue. We consider the trial court's instruction on this to be appropriate considering the manner of trying and defending this cause.

VI.

WAS THE INSTRUCTION ON THE MEASURE OF DAMAGE PROPER?

The claim for compensatory damage was \$75,000 for lost wages and benefits from the date of discharge to September 1973, and the court instructed the jury that the measure of damage to be considered included all of the salary and wages, overtime pay, vacation pay, insurance, seniority and fringe benefits which the plaintiff would have received during the period he would have been working for the railroad company. The verdict was \$40,000 and it is contended that this was excessive; that conceding that it would be liable for lost wages, etc. if there were proof of such damages, there was not sufficient evidence. There was no objection by the Union to the instruction given on the measure of damage.

About the only tangible evidence in the record is for lost wages, which would be based on his continuing to have his old job. Although he testified as to loss of seniority together with insurance and other fringe bene-

fits, there was a lack of evidence as to the reasonable value of these items. He did testify as to loss of \$1,000 for medical costs resulting from lost insurance. It is argued that he should not have damages based upon his pay at the old job because he would not have been performing it due to his injury. He had a disability which prevented him from performing his job as a radioman. No doubt he was unable to testify as to the wages he would receive had he retained his status and been given another job. The only standard that he had to offer was his pay that he had been receiving. Undoubtedly his loss of fringe benefits was worth something, but from the record we are not able to say what their worth was. Nor can we say that the jury's conclusion was wrong.²

As to his having settled with the railroad for the injury under F.E.L.A., we do not view this as precluding a recovery for breach of duty of fair representation against another party.

The next point advanced by the Union is that the trial court erred in instructing the jury that they could award punitive damages in order to punish the wrongdoer for some extraordinary misconduct in order to serve as an example to others if they found that the Union had acted "maliciously, or wantonly, or oppressively." This instruction was objected to, the basis being that the cause was not a proper one for exemplary damages.

The Union relies on some language in *Vaca, supra*, 386 U.S. at 195, which says that under the circum-

² The tangible dollars and cents evidence was from the defendant. He said that his wage loss in the period in question exceeded \$31,000. He also testified that he spent \$1,000 for medical costs in connection with his wife's illness. No expert testimony was given as to the value of the fringe benefits that were the intangible property right of the job. We doubt whether such expert testimony would have added anything. The jury was no doubt convinced that the mentioned values were substantial enough to justify the verdict.

stances of that case neither compensatory nor punitive damages were proper. *Dicta in Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005 (3d Cir. 1977), indicates that such damages are not recoverable.

In *Butler v. Local U. 823, Int. Bro. of Teamsters, ect.*, 514 F.2d 442 (8th Cir. 1975), the Local's conduct was not regarded as the type "of outrageous or extraordinary conduct for which extraordinary remedies are needed." The opinion continued that it amounted to the commonly encountered policy of favoring one group of members over another. The Eighth Circuit expressed the view that in order to have exemplary damages, there had to be express malice. The *Butler* court also mentioned that the federal courts should fashion remedies under the labor statutes with a view to achieving a goal of industrial peace.

The Fourth Circuit in *Harrison v. United Transp. Union*, 530 F.2d 558 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976), held that punitive damages were proper where the union was guilty of misleading conduct in the extinguishment of a railroad conductor's right to pursue its grievance. The court said that in a suit against a union for failure to provide fair representation, punitive damages were important in bringing about the objectives of the remedy. The fair representation case was compared to the civil rights action. That court also rejected the necessity for having actual malice in the sense of personal animosity. *Compare also Emmanuel v. Omaha Carpenters Dist. Council*, 560 F.2d 382, 386 (8th Cir. 1977).

We are not convinced that actual animosity or express malice or premediated malice are essential to the award of punitive damages. Wanton conduct or reckless disregard for the rights of the employee should suffice. We approve, therefore, of the submission by the court of the issue of exemplary damages to the jury, and we find no fault in the trial court's instruction.

Nor are we able to say that the amount awarded was excessive. We can, however, say that the sum of \$75,000 seems high, and as a result we feel that the trial court should have an opportunity to reconsider the question whether it is excessive and to order a remittitur if on reconsideration it determines that the amount is excessive. This question is better determined by the trial judge who heard the evidence and is more in tune with the facts than is this court.

The judgment of the district court is affirmed with the exception of the award for exemplary damages. As to that, the trial court is directed on remand to reconsider the amount³ of the exemplary damage award in order to determine whether it is excessive. Should the trial court conclude that it is excessive, that court is authorized to order the amount of the excess to be remitted by the appellee or, in the alternative, the court is authorized to grant a new trial on the question. If it determines that it is not excessive, it shall allow it to stand.

It is so ordered.

³ As to the authority of the appellate court so to act, *see, e.g.*, *Du Breuil v. Stevenson*, 369 F.2d 690 (5th Cir. 1966); *Matanuska Valley Lines, Inc. v. Neal*, 255 F.2d 632 (9th Cir. 1957).

RAILWAY LABOR ACT

45 U.S.C.

45 U.S.C. 151 *et seq.*

45 U.S.C. 152 § 2 Second

Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers by the employees thereof interested in the dispute.

45 U.S.C. 152 § 2 Third

Designation of representatives

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives or employees for the purposes of this chapter need not be persons in the employee of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as as their representatives of those who or which are not employees of the carrier.

45 U.S.C. 153 § 3 First(i)

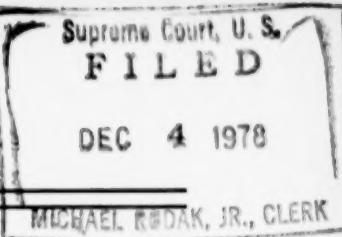
(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or

working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition to the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

45 U.S.C. 153 § 3 First(j)

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dispute submitted to them.

APPENDIX



IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-38

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
et al.,

Petitioners,

vs.

LEROY FOUST,

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 5, 1978
CERTIORARI GRANTED OCTOBER 10, 1978



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DOCKET ENTRIES

DATE	PROCEEDINGS
1974	
April 19	Complaint with jury demand, filed.
	Motion for appointment of U.S. Marshal, No. Dist. of Illinois, as special process server upon International Brotherhood of Electrical Workers & Frank T. Gladney, filed.
	Motion for appointment of Sheriff of Carbon Co., Wyo. as special process server upon deft. D. F. Jones, filed.
	Motion for appointment of Sheriff of Douglas Co., Neb. as special process server upon deft. Leo Wisniski, filed.
22	Order appointing U.S. Marshal, No. Dist. of Illinois, as special process server for service upon deft. International Brotherhood of Electrical Workers & deft. Frank T. Gladney, International Vice President, filed.
	Order appointing Sheriff of Carbon Co., Wyo. as special process server upon deft. D. F. Jones, filed.
	Order appointing Sheriff of Douglas Co., Neb. as special process server upon deft. Leo Wisniski, filed.
	Appearance of Urbigkit, Moriarity, Halle & Mackey as attorneys for plaintiff, filed.
May 16	Summons with Marshal's return of service upon deft. Gladney on 5-9-74, filed.
	Summons with Marshal's return of service upon deft. Int'l Brotherhood of Electrical Workers on 5-9-74, filed.

DATE	PROCEEDINGS
1974	
June 13	Appearance of Lathrop, Uchner & Mullikin as attorneys for defendants, filed.
	Answer of defendants, filed.
26	Appearance of Mulholland, Hickey & Lyman as attorneys for defts., filed.
Oct. 2	Notice setting jury trial for May 27, 1975 at 9:30 a.m., filed, copies to counsel.
16	Notice of deft. International Brotherhood of Electrical Workers to take deposition of pltf. Leroy Foust on Oct. 24, 1974, filed.
Nov. 19	Deposition of Leroy Don Foust taken by defendants on October 24, 1974 filed.
1975	
Jan. 24	Order setting pre-trial conference for March 3, 1975 at 10:30 a.m., filed, copies to counsel.
Feb. 24	Response of defts. to pre-trial order, filed.
Mar. 3	Plaintiff's pre-trial submission, filed. Pre-trial conference held this date. Order on pretrial conference filed, copies to counsel.
7	Motion of pltf. to amend the complaint, filed. Order granting motion to amend complaint by alleging that Dean F. Jones is a citizen of the State of Oregon, filed, copies to counsel.
26	Amended complaint, filed.
Apr. 23	Defendant's first interrogatories to pltf., filed.
May 5	Motion of defts. to dismiss or in the alternative for summary judgment, filed. (Memorandum and affidavit attached)

DATE	PROCEEDINGS
1975	
May 5	Notice striking trial setting and setting hearing on motion for summary judgment in lieu thereof on May 27, 1975 at 9:30 a.m., filed, copies to counsel.
22	Plaintiff's answers to defendants First Interrogatories, filed. Affidavits of pltf. and Edward P. Moriarity in opposition to motion to dismiss or in the alternative for summary judgment, filed.
27	Pltf's memorandum in opposition to the deft's motion to dismiss or in the alternative for summary judgment, filed. Hearing held this date on motion to dismiss or for summary judgment. Motion taken under advisement.
30	Notice of pltf. of taking deposition of Dr. Robert W. Taylor, filed.
June 9	Statement in lieu of deft's argument in rebuttal, filed.
17	Memorandum Opinion, filed. Order overruling motion to dismiss or in the alternative for summary judgment, filed, copies to counsel.
July 11	Deposition of Robert Walker Taylor, M.D., taken on behalf of the plaintiff, filed.
Sept. 15	Notice of pltf. of the taking of the deposition of D. F. Jones, filed.
Oct. 21	Notice setting jury trial for 4-8-76 at 9:30 at Cheyenne before Brimmer, filed, copies to counsel. (on 10-22-75)

DATE	PROCEEDINGS
1975	
Nov. 3	Notice of pltf. of taking depositions of Leo Wisniski, filed.
Dec. 2	Deposition upon oral examination of Dean F. Jones, filed.
1976	
Mar. 24	Defendants second interrogatories to pltf., filed. Deposition of Leo Wisniski, taken on behalf of pltf., filed.
25	Notice resetting jury trial for 9:30 a.m., May 13, 1976 in Cheyenne, before Judge Brimmer, in court room 2, filed, copies to counsel.
Apr. 9	Plaintiff's answers to defts' second interrogatories, filed.
28	Amendment to pltf's answers to defts' second interrogatories, filed.
May 3	Pltf. precipe for subpoena, filed, and subpoena and copy issued.
10	Motion of defts. to deny jury trial, with memorandum attached, filed.
13	Trial to Court and Jury commenced and continued to 5-14-76 at 9 a.m. Courtroom minute sheet filed.
14	Trial to Court and jury resumed and jury returns verdict for pltf. Courtroom minute sheet filed.
	Verdict filed, Clerk to enter Judgment on the verdict.

DATE	PROCEEDINGS
1976	
May 17	Judgment on jury verdict that pltf. recover of and from defts. the sum of \$115,000, constituting the jury award of \$40,000 actual or compensatory damages and \$75,000 punitive or exemplary damages, pltf. to have his costs, ent. & filed, copies to counsel. Instructions, filed.
25	Deft.'s motion for judgment notwithstanding the verdict and alternative motion for new trial, filed.
June 23	Certificate of costs, filed by pltf.
Jul. 1	Bill of pltf's costs issued and filed and copies to counsel.
7	Notice setting hearing on motion for judgment notwithstanding the verdict and alternative motion for new trial for 9:00 a.m., 7-14-76, at Cheyenne before Judge Brimmer, filed. Cys. to counsel.
14	Hearing on motions for judgment notwithstanding verdict, new trial, and new trial on punitive damages or remittur—all motions under advisement. Court to prepare Order. Courtroom minute sheet filed.
23	Order denying defts' motions for judgment notwithstanding the verdict or in the alternative for a new trial, filed, copies to counsel.
Aug. 19	Notice of appeal filed by defts., and copies mailed by Clerk on 8-20-76 to Attorneys Urbigkit, Mackey & Whitehead; Lathrop, Uchner & Multikin; and Mulholland, Hickey & Lyman, and to Clerk, U.S. Court of Appeals, Tenth Circuit. Bond for costs on appeal (\$250.00 cash), filed.

DATE	PROCEEDINGS
1976	
Sept. 15	Letter dated 9-13-76 from appellant in the nature of a designation of record on appeal, filed.
16	Letter dated 9-13-76 from appellant in the nature of a supplemental designation of record on appeal, filed.
23	Motion for extension of time for preparation of transcript and transmission of record on appeal, filed. Order extending time to Nov. 2, 1976 for preparation of transcript and transmission of record on appeal, filed, copies to counsel and Clerk, USCA.
Oct. 20	Notice that case docketed in U.S. Court of Appeals on 10-19-76 and given No. 76-1951, filed. Reporter's transcript of trial proceedings (2 volumes), filed.
20	Receipt for exhibits and transcripts, filed.
28	Motion for leave to withdraw as counsel for defts., filed. Order allowing Lathrop, Uchner & Mullikin to withdraw as counsel for defts., filed, copies to counsel, and Clerk, U.S.C.A.
Nov. 2	Original record on appeal, in five volumes, forwarded to the Clerk, USCA, 10th Circuit, Denver, CO.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C 74-50

LEROY FOUST,

Plaintiff,

—vs—

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;
D. F. JONES, District Chairman in his Representative Capacity; LEO WISINSKI, General Chairman in his representative capacity; and FRANK T. GLADNEY, International Vice President in his representative capacity,
Defendants.

AMENDED COMPLAINT

Plaintiff hereby amends his complaint as follows:

For his cause of action, plaintiff complains of defendants as follows:

1. The plaintiff, LeRoy Foust, is a citizen of the State of Wyoming; the defendant, International Brotherhood of Electrical Workers is a corporation with head offices in Rosemont, Illinois; the defendant, D. F. Jones, is a citizen of the State of Oregon; the defendant, Leo Wisinski, is a citizen of the State of Nebraska; the defendant, Frank T. Gladney, is a citizen of the State of Illinois; and the amount in controversy, exclusive of costs, exceeds the sum of \$10,000;

2. LeRoy D. Foust was an employee of the Union Pacific Railroad for approximately 20 years; was a member of International Brotherhood of Electrical

Workers since 1956 and is presently an inactive member of said Union; that due to injury and resulting surgery in September, 1970, he was unable to work and, by a letter dated February 3, 1971 (Exhibit A), was discharged from his employment with the Union Pacific Railroad. Said letter was received by plaintiff on February 5, 1971;

3. D. F. Jones was District Chairman of the International Brotherhood of Electrical Workers, and Leo Wisinski was General Chairman of said Union at all times pertinent thereto, and Frank T. Gladney was International Vice President of IBEW at all times pertinent hereto;

4. After receiving Exhibit A, plaintiff contacted representatives of the Union Pacific Railroad and asked them to reconsider and let plaintiff know if the dismissal was final. The Union Pacific Railroad did not reply to such request and plaintiff was required by Union contract to pursue his allegations of wrongful discharge through the Union;

5. The Union Pacific Railroad and System Federation No. 105, IBEW, had entered into an agreement dated April 1, 1957 that dealt with the grievance procedure required to be followed to handle disputes of this nature. Rule 21 of said Agreement requires that notice be given of a grievance within 60 days of the date the grievance occurred;

6. On March 26, 1971, a certified letter was sent to D. F. Jones, District Chairman, IBEW, on behalf of the plaintiff, with a carbon copy to Mr. Wisinski and the International IBEW, requesting that proper, timely, and adequate representation of his grievance be pursued by the IBEW and its representatives. Said letter to D. F. Jones was received on March 27, 1971;

7. On April 5, 1971, a letter to Mr. Foust was sent by Mr. Jones informing plaintiff that he personally must request the assistance noted in Paragraph 6 above. On April 6, 1971, after further discussion of this matter by representatives of the plaintiff and Mr. Wisinski, the grievance was filed;

8. The grievance was pursued before the National Railroad Adjustment Board, Second Division, and on June 2, 1972 an award was made denying the claim of the plaintiff on the ground that a timely grievance was not filed pursuant to Rule 21(1) of the Agreement referred to in Paragraph 5 above;

9. The above-named defendants breached the contract between the IBEW and plaintiff that required the IBEW to fairly represent the plaintiff and other Union members in pursuit of a grievance;

10. The above-named defendants were guilty of gross non-feasance and hostile discrimination in arbitrarily and capriciously refusing to process the plaintiff's grievance and refusing to timely file said grievance as required by the contract;

11. As a proximate result of the defendants' non-feasance and hostile discrimination, breach of contract and breach of duty of fair representation, the plaintiff was damaged in that he was barred from pursuing his grievance which would have enabled him to return to work with the Union Pacific Railroad from February 5, 1971 and in that he incurred great mental strain, anguish, pain and suffering, legal expenses, all to his damage in the amount of Seventy Five Thousand Dollars (\$75,000).

WHEREFORE, plaintiff prays for a judgment against defendants, jointly and severally, for damages in the amount of Seventy Five Thousand Dollars (\$75,000) and punitive damages in the additional amount of Seventy

Five Thousand Dollars (\$75,000), for a total judgment amount of One Hundred Fifty Thousand Dollars (\$150,000).

LEROY D. FOUST

By /s/ [Illegible]
 OF URBIGKIT, MORIARITY, HALLE &
 MACKEY, P.C.
 502 Cheyenne National Bank Tower
 P.O. Box 247
 Cheyenne, WY 82001
 His Attorneys

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25 day of March, 1975, he caused full, true and correct copies of the foregoing amended complaint to be served, by mailing said copies thereof in sealed envelopes with proper postage attached thereto, and depositing same in the United States Post Office at Cheyenne, Wyoming, addressed as follows:

Mr. David D. Uchner
 Lathrop, Uchner & Mullikin, P.C.
 400 American National Bank Building
 Cheyenne, WY 82001

Mr. William J. Hickey
 Mulholland, Hickey & Lyman
 1125 - 15 Street, N.W.
 Washington, D.C. 20005

/s/ [Illegible]

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF WYOMING

No. C 74-50

LEROY FOUST,
Plaintiff,
 —vs—

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;
 D. F. JONES, District Chairman in his Representative Capacity; LEO WISINSKI, General Chairman in his representative capacity; and FRANK T. GLADNEY, International Vice President in his representative capacity,
Defendants.

**ORDER OVERRULING MOTION TO DISMISS
 OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT**

The above-entitled matter coming on regularly for hearing before the Court upon defendants' Motion to Dismiss or in the Alternative for Summary Judgment, and the Court having heard the arguments of counsel in support of said motion and in opposition thereto, took said matter under advisement, and having prepared and filed herein its Memorandum Opinion, and being fully advised in the premises; NOW THEREFORE IT IS

ORDERED that said Motion to Dismiss or in the Alternative for Summary Judgment be, and the same is hereby, overruled.

Dated this 17th day of June, 1975.

/s/ Ewing T. Kerr
 Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C 74-50

—
LEROY FOUST,
Plaintiff,
—vs—

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;
D. F. JONES, District Chairman in his Representative Capacity; LEO WISINSKI, General Chairman in his representative capacity; and FRANK T. GLADNEY, International Vice President in his representative capacity,
Defendants.

Walter C. Urbigkit, Jr. and Terry W. Mackey of the firm of Urbigkit, Moriarity, Halle & Mackey, P.C., Cheyenne, Wyoming, appearing as counsel for plaintiff.

William J. Hickey, Jr., of the firm of Mulholland, Hickey & Lyman, Washington, D. C., appearing as counsel for defendants.

MEMORANDUM OPINION

KERR, District Judge

Decided June 17, 1975.

Plaintiff Leroy Foust has brought this action against defendant union and some of its officials. Plaintiff alleges that defendants failed to properly and fairly represent him when he filed a grievance alleging wrongful discharge by his former employer, who is not a party to this action. Plaintiff generally alleges that defendants failed to

properly pursue his wrongful discharge grievance in a timely fashion resulting in dismissal of the grievance by the Railroad Adjustment Board on the basis that more than sixty (60) days had expired since the date of the occurrence upon which the grievance was based. Defendants have moved for summary judgment and have filed supporting affidavits. Plaintiff has filed affidavits in opposition to the motion, together with his objections thereto.

This Court has previously noted that summary judgment is a "drastic remedy" and that the Court should proceed with caution. See *Keller v. California Liquid Gas Corporation*, 363 F.Supp. 123 (D.C. Wyo. 1973). It is not to be granted where there exists a genuine issue as to a material fact. See *Ando v. Great Western Sugar Company*, 475 F.2d 531 (10th Cir. 1973). As stated by Judge Barrett, "it is not properly awarded when an issue turns on credibility." See *Redhouse v. Quality Ford Sales, Inc.*, 511 F.2d 230, 234 (10th Cir. 1975), quoting from *Eagle v. Louisiana and Southern Life Insurance Company*, 464 F.2d 607 (10th Cir. 1972). Summary judgment does not serve as a substitute for trial, nor can it be employed so as to require parties to litigate via affidavits. See *Jones v. Nelson*, 484 F.2d 1165 (10th Cir. 1973). Pleadings, therefore, must be liberally construed in favor of the party opposing summary judgment. *Smoot v. Chicago, Rock Island and Pacific Railroad Company*, 378 F.2d 879 (10th Cir. 1967).

Without unduly delving into the merits, it does not appear that this is a case where the union exercised its discretion in failing or refusing to file a grievance, see *Crawford v. Pittsburgh-Des Moines Steel Co.*, 386 F.Supp. 290 (D.C. Wyo. 1974), inasmuch as the contention is that the union failed to timely file, to the prejudice of plaintiff. The correspondence submitted as exhibits is voluminous and is contradictory or at least subject to

differing interpretations. Thus, the credibility and intent of the authors would be very much in issue. Further, the affidavits are strikingly disparate in their statements of the facts. In such a situation, the affidavits serve to create genuine issues rather than dispose of them. Further, the defendants rely heavily on a settlement previously reached with the employer as absolving them of any liability, whereas plaintiff heatedly disputes that the release in the prior action was intended to cover or be applicable to any claim against the union. Intent would here be crucial in determining the scope of that release. Thus, it is clear that genuine issues as to material facts exist, and an order overruling the Motion to Dismiss or in the Alternative for Summary Judgment will be entered.

FOR THE DISTRICT OF WYOMING

No. C 74-50

C74-50B

LEROY FOUST,

Plaintiff,

—vs—

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;
D. F. JONES, District Chairman in his Representative Capacity; LEO WISINSKI, General Chairman in his representative capacity; and FRANK T. GLADNEY, International Vice President in his representative capacity,
Defendants.

Volume I of II

May 13, 1976

TRANSCRIPT OF TRIAL PROCEEDINGS

Transcript of Trial Proceedings on the above-entitled matter before the Honorable Clarence A. Brimmer, Judge, and a jury of six, Cheyenne, Wyoming, commencing on the 13th day of May, 1976.

APPEARANCES

For the Plaintiff:

URBIGKIT, MACKEY & WHITEHEAD
Attorneys at Law
17th and Carey
Cheyenne, Wyoming 82001
By Mr. TERRY W. MACKEY

For the Defendants:

LATHROP, UCHNER & MULLIKIN
Attorneys at Law
American National Bank Building
Cheyenne, Wyoming 82001
By Mr. DAVID D. UCHNER

[2] MULHOLLAND, HICKEY & LYMAN
Attorneys at Law
Suite 400,
1125 15th Street, N.W.
Washington, D.C. 20005
By Mr. WILLIAM J. HICKEY

* * * *

[30]

LEROY D. FOUST,

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MACKEY:

Q. Would you state your full name, please?
A. LeRoy D. Foust.

* * * *

[39] Q. All right. Did there come a time when you sought a third leave of absence?

A. Yes.
Q. When was that, Mr. Foust?
A. Well, the leave of absence ended on the 22nd and I had contacted a fellow employee down at the railroad to bring me a leave of absence.
Q. Who was that fellow employee?
A. This was Glen Harwick. He was a District Lineman that worked at Cheyenne, also out of Cheyenne, with the district he took care of.

Q. Was he a friend of yours?
A. Yes.
Q. Go ahead and tell the jury how you obtained that third leave of absence form.

A. Well, at this particular time weather and everything was bothering me, so I asked him if he would drop the forms by me so I could get another leave of absence. I did this at least a week in advance and he didn't show up.

So I finally called him again and he said he was real busy and he forgot this and he would get them. On the 23rd of December he brought them out to me.

And at this particular time before coming to Cheyenne he was district man up at Gering and he had these forms

that was of an older type. And I wasn't sure that—[40] at different times we got criticized for using the older forms. We were supposed to use the newer forms.

I told him, "Old branch lineman, you are going to have to get a little more modern."

He said he would run back to the shop there where he had a supply of these and then he returned with the leave of absence form.

I filled this out and he took it and they put it in a Thousand Miler envelope. These envelopes were what the railroad use, and the last address, you cross it out and write another one in. So every time you sent one of these envelopes, it was the possibility it would go more than a Thousand Miler. This is where I think they got the nickname of Thousand Miler envelope.

Q. Did you put that in the envelope?

A. Yes.

Q. Did you sign that form?

A. Yes.

Q. That was when?

A. On the 23rd.

Q. Had your leave of absence expired prior to that time, your former leave of absence?

A. It ended on the 22nd of December.

Q. All right. And did you ever make further inquiry about that?

[41] A. Yes. When I filled this out, I'd just seen the doctor prior to this and talked to him about going to work again and he was saying, "Well, maybe in about six months we will see how you are doing."

I filled out this leave of absence and I was thinking, "Six months is what the doctor said." And I said, "I could beat him a month."

I put in five months. There are two places you insert time. One place I put six months, the other place I put five months.

It didn't dawn on me until after Glen had left with the thing and everything. I could get hold of him at the depot. I guess he was out on a trouble call or something.

And the next day I called him and asked him if he had mailed this yet and he said he hadn't. He apologized to me and said he got called out on this trouble and he would do it right away.

I said there was one thing I wanted him to do and I explained to him in one place I put six months and the other place put five months. And I asked him to correct both of them to coincide, I believe, to five months. And he said he would do this and mail it for me. This was right before Christmas.

So then I got to thinking that maybe if he got busy again this might have happened so I called him on the [42] telephone after Christmas and asked him if he had done this and he said, "Yes," and he and D. C. Martin down at communications, he was the manager of the office, had done this, and put it in an envelope. He didn't say whether a Thousand Miler or regular envelope. And then put it in a Omaha box where all Omaha mail goes into the one box, goes into a pouch and then into a mailing system. That goes directly to Omaha.

Q. Did he tell you how long after the 23rd it had been mailed?

A. No. At that particular time he didn't say the exact date or anything like this, just that he and D. C. Martin had done this and seen it got in the Omaha box in the pouch.

Q. All right. Did there come a time when you heard further from anyone in regard to that leave of absence request?

A. Yes. From Omaha, that my leave of absence was not in and everything like this. And I had obtained attorneys to help me in my affairs and matters and everything and I took this down to my attorney which was Mr. Moriarity and I explained to him what I had done with

this leave of absence and everything else like that and I could not understand why they had not received this.

Q. Now you mentioned that Mr. Moriarity was your attorney. Had you retained an attorney for any reason in regard to your injury or employment with Union Pacific?

[43] A. Well, yes. Basically after I took my myelogram, I run into all kinds of difficulties and I couldn't handle my affairs. And it was really taxing my wife and everything like this. She couldn't help me much. So I obtained an attorney. I told him to contact Mr. Jones, the District Chairman there, that he was representing me and everything like this as he did and also to contact the railroad, Mr. Wolters, Claim Agent there that he was my representative.

Q. All right. Mr. Foust, you mentioned that you ultimately received correspondence from the Union Pacific Railroad.

I hand you what was received into evidence at the Pre-Trial Conference as Defendants' Exhibit A and ask you if that is the correspondence you received?

A. Yes, this is it.

* * * *

"Dear Mr. Foust:

[44] "Your present leave of absence dated September 22, 1970, expired December 22, 1970.

"We have heard nothing from you and it is necessary that we promptly receive proper request for leave of absence accompanied by a statement from the doctor as to the necessity for the leave, including the approximate date that you may be expected to return to your position as radio man.

"Yours truly," and it is stamped R. B. J.

Q. Do you know what that stamp R. B. J. means?

A. Yes. This is Chief Clerk, Ralph Jetson.

Q. Now as a result of that letter of January 12, 1971, did you take any action?

A. Yes. When I talked to my attorney, Mr. Moriarity, I told him while I was in the hospital I told Dr. Taylor he was supposed to get in a letter, how ever they did it, that I was in the hospital.

Q. Did you instruct your attorney to take any action?

A. I asked him, I said, would he write a letter for me to Omaha to find out what they wanted and that I had sent in a leave of absence request and couldn't understand what was necessary.

Q. Mr. Foust, I show you what was received into evidence at the Pre-Trial Conference as Defendants' Exhibit B [45] and would ask if that is the letter you instructed Mr. Moriarity to write?

A. Yes.

* * * *

A. This is a letter to Mr. C. O. Jett, Superintendent of Communications, Union Pacific Railroad Company, Transportation Division, 1416 Dodge Street, Omaha, Nebraska. Reference to LeRoy D. Foust.

"Dear Mr. Jett:

"Our law firm has been retained to represent the above-named Mr. Foust in regards to recovery for injuries he sustained on March 9, 1970.

"We are in receipt of your letter dated January 12, 1971, which you sent to Mr. Foust by registered mail return receipt requested. In the letter you stated that it was necessary that you promptly receive a proper request for a leave of absence accompanied by a statement from the doctor as to the necessity for the leave.

"Enclosed is a photocopy of Union Pacific Railroad Company Form 153, Request for Leave of Absence. [46] This form was filled out by Mr. Foust requesting the five-month medical absence from December 23, 1970, through May 23, 1971, for the reason of the personal injury he sustained on March 9, 1970, and by order of Dr. Taylor. The original of this form was deposited in the U. P. mail, the Omaha pouch, in December of 1970.

"It would be appreciated if you would please inform us if the original of Form 153, described above, has been received by your office. If not, please notify this office as to what form or forms that will be necessary for Mr. Foust to file in order to receive the requested medical leave of absence.

"Very truly yours, Edward P. Moriarity."

* * * *

"Dear Mr. Moriarity:

[47] "Reference your letter January 21, 1971, which we are answering as a matter of courtesy as Mr. L. D. Foust, Radio Man, has not advised this office of granting" —I think is it legal position?

Q. Granting him permission.

A. Oh.

"granting him permission for anyone to represent him.

"On January 4, 1971, we did receive from Mr. Foust Form 153, Request for Leave of Absence, dated December 23, 1970. However, it is necessary that we receive a statement from a physician as to the nature of the injuries and when it is expected he will be able to return to work in order to support his request for leave account medical reasons.

"When a statement from a doctor is received, the request for leave of absence will be given consideration."

Q. Now, Mr. Foust, in relation to your requested leave of absence, had you discussed that with the doctor?

A. Yes.

Q. What did you understand the doctor was doing in relation to it?

A. I thought all these forms had been taken care of so I automatically, after receiving this other letter they wanted a medical, I went to his office and told his office [48] girl that I was going to have to have a letter that they present to verify that I needed a medical leave of absence.

Q. And who prepared or who actually prepared a letter for you in that regard?

A. Well, they was done by his office help and then signed by Dr. Taylor as to substantiate my medical leave of absence that I was supposed to be on.

Q. Who told you you could not go back to work?

A. He had never released me. I had never at this point reached a point of release.

Q. "He" meaning Dr. Taylor?

A. Meaning Dr. Taylor, yes.

Q. How did it come that you came to be Dr. Taylor's patient?

A. Well, he was a second orthopedic specialist and I followed up with him.

Q. You were sent to him by the Union Pacific Railroad?

A. Yes. The hospital association, railroad doctors, sent me over to him.

Q. At the infirmary?

A. Right. They sent me to him.

Q. And did you know whether or not Dr. Taylor provided other forms to the railroad in regard to your medical condition?

A. Well, I didn't know for sure, but I knew that he [49] was supposed to send in, I think, monthly reports about my progress and everything like this.

Q. On your two prior leaves of absence, had you ever specifically requested Dr. Taylor to send anything to the railroad?

A. No.

Q. And both of those leaves of absence were granted?

A. Yes.

Q. Were you ever advised when those were granted that you needed anything further to complete them?

A. No.

* * * *

[50] A. This is a letter of February 3, 1971, registered mail, return receipt requested. Mr. L. D. Foust, 1502 Adams, Cheyenne, Wyoming. Copy went to Mr. Leo Wisniski, General Chairman, IBEW, 5636 Spring Street, Omaha, Nebraska.

"On January 12, 1971, we wrote you as follows:

"Your present leave of absence dated September 22, 1970, expired December 22, 1970.

"We have heard nothing from you and it is necessary that we promptly receive proper request for leave of absence accompanied by a statement from the doctor as to the necessity for the leave, including the approximate date that you may be expected to return to your position as radio man."

"On January 14, 1971, we received a request for leave of absence dated December 23, 1970, reading: 'I request medical absence of five months from December 23 [51] through May 23, 1971, for the following reason—Personal injury by order of Dr. Taylor.'

"For your failure to furnish a request for leave of absence prior to the expiration of the original leave of absence which expired on December 22, 1970, and failure to furnish a statement from the doctor as to the necessity for additional leave, your services with the Union Pacific Railroad Company are terminated, effective immediately in accordance with the Agreement between the Union Pacific Railroad Company and System Federation No. 105, International Brotherhood of Electrical Workers, dated April 1, 1957, Rule 23(b):

"Failure to report for duty at the expiration of leave of absence shall terminate an employee's service and seniority, unless he presents a reasonable excuse for such failure not later than seven days after expiration of leave of absence."

"Yours truly, C. O. Jett."

Q. Mr. Foust, did you take any action in regard to that?

A. Yes.

Q. When you received that letter?

A. Yes. I went to my attorney, Mr. Moriarity, and I instructed him to write a letter to find out what they needed and everything like this. I couldn't understand why they [52] were doing this because I had followed all the basic rules and everything like this.

I asked for the medical thing from the doctor, but I can't tell doctors exactly when they are going to do something or anything like this. But the request was made and I assumed everything was taken care of.

Q. Did you have any conversation after you received that letter with your attorney?

A. Yes.

Q. Did you give him any instructions?

A. Yes. He was to handle it with Mr. Jett and also with my Union.

[54] A. This is a letter of February 11, 1971.

"Mr. C. O. Jett, Superintendent of Communications, Union Pacific Railroad, Transportation, 1416 Dodge Street, Omaha, Nebraska."

Reference to Mr. LeRoy D. Foust.

"Dear Mr. Jett:

"I am in receipt of a letter which was received by Mr. LeRoy D. Foust from you on February 5, 1971, in which you stated that his services with the Union Pacific Railroad [55] Company were terminated, effective immediately, in accordance with the agreement between the Union Pacific Railroad Company and System Federation No. 105, International Brotherhood of Electrical Workers, dated April 1, Rule 23(b).

"On January 25, 1971, you sent a letter to me in regards to Mr. Foust. In that letter you stated that you were answering as a matter of courtesy since you had not been advised that Mr. Foust had granted his permission for anyone to represent him. On November 19, 1970, in a letter to Mr. W. L. Wolter, Claim Agent for the Union Pacific Railroad Station in Cheyenne, Wyoming, we gave the Union Pacific Railroad formal notice that we were representing Mr. Foust. I fully realize that the Union Pacific Railroad Company is a large organization but they should be efficient enough so that a man of your importance can be informed when an employee is being represented by legal counsel.

"Since we are representing Mr. Foust, whether you like it or not, we hereby make formal protest of the appalling action taken pursuant to your letter of February 3, 1971. It is Mr. Foust's contention that Rule 23(b) is not applicable to his situation. Rule 24 states, 'In case an employee is unavoidably kept from work, he will not be discriminated against.' Mr. Foust is unavoidably kept from work. He received a broken back as a result of his employment with the Union Pacific Railroad, has served faithfully the great U. P. R. R. [56] for twenty years. He has complied with Rule 25 in regards to a personal injury by making all reports that are necessary to the company.

"Even though Mr. Foust earlier protested that he should not be required to file a request for medical absence, he has complied with the request of the Union Pacific. When he went into the hospital in August of 1970 to have his back operated on, he requested Dr. Taylor, a railroad physician, to give the railroad whatever medical information was necessary. Since that time Mr. Foust has filed three requests for medical leave of absence—the first two were fully granted. It was assumed that the Union Pacific had required information from Dr. Taylor at that time.

"Incidentally, Dr. Taylor has given me a full medical report and informed me that he furnished the same information to the Union Pacific Railroad. The Union Pacific is not without proper notice from a doctor.

"In your letter to me on January 25, 1971, you stated that when a statement from the doctor was received, the request for leave of absence would be given consideration. I immediately contacted Dr. Taylor and he, at first, said that he had sent in the form. Then, after checking his records, he found out that he had not submitted the form, but he told me that he would do so through normal railroad channels. He forwarded me a copy of the required information [57] and, as a safety precaution, I sent you a photocopy of what I received.

"It would be appreciated if you would review this file and let us know if the decision to terminate Mr. Foust's employment with the Union Pacific is final. If the action is deemed to be in the best interest of the Union Pacific, irregardless of the substantial amount of public relation advertisement now being used, it surely is not in the best interest of Mr. Foust with his injuries compounded by the necessity to feed, clothe and care for five children.

"Very truly yours, Edward P. Moriarity."

Q. Mr. Foust, do you know whether or not the Union Pacific replied to that?

A. Yes, I believe he did.

Q. What was the reply?

A. That the letter of termination was final.

Q. They would not reconsider their position?

A. No.

Q. As a result of that reply from the Union Pacific Railroad, did you take any action?

A. Yes. I instructed my attorney to contact Mr. Dean Jones, the District Chairman, and to go through the proper channels this way to have this done away with.

Q. What did you want the Union to do?

A. To represent me. This was a gentleman at Rawlins, [58] Wyoming, Mr. Dean Jones, and I instructed my attorney to go through the proper procedure and contact him and everything.

Q. All right. Mr. Foust, I hand you what was received into evidence at the Pre-Trial Conference as Plaintiff's Exhibit No. 14 and ask you if that is the action that was taken as a result of your request?

A. Yes.

Q. What is that?

A. This is a letter dated March 26, 1971, to Mr. D. F. Jones, 514 - 12th Street, Rawlings, Wyoming.

* * * * *

A. This is in reference to L. D. Foust, Radio Man, LU No. 775, Seniority Date 5-14-62—Social Security No. 508-32-2651.

"Dear Mr. Jones:

[59] "We have been informed that you are the officer of the carrier authorized to receive grievances under Rule 21 of the Agreement between the Union Pacific Railroad and System Federation No. 105, International Brotherhood of Electrical Workers, dated April 1, 1957. If you are not the officer so authorized under Rule 21 would you please, in your official capacity as Union representative of Mr. Foust, please inform us by return mail who is the officer of the carrier authorized to receive grievances and also, please forward on to him this written grievance claim which we are submitting pursuant to Rule 21.

"On February 5, 1971, Mr. L. D. Foust received a letter from Mr. C. O. Jett, a carbon of which was sent to Mr. Leo Wisniski, General Chairman of the IBEW, which terminated Mr. Foust's services with the Union Pacific Railroad. A copy of this letter is attached. It is Mr. Foust's contention that his termination was in clear violation of the Agreement between the Union

Pacific Railroad and the International Brotherhood of Electrical Workers. Mr. Foust has complied with Rule 25 of said Agreement which deals with personal injury. He has filed all papers requested of him by the Union Pacific Railroad. His doctor, Dr. Taylor, has kept the Union Pacific informed as to Mr. Foust's medical progress. Dr. Taylor is a Union Pacific doctor.

"Pursuant to Rule 21 Mr. Foust is making this [60] written report of his grievance claim and hereby requesting the International Brotherhood of Electrical Workers to do everything within their power to enable Mr. Foust to be reinstated as an employee of the Union Pacific Railroad without any loss of wages or loss of seniority. The action of Mr. C. O. Jett was completely arbitrary and capricious, without proper foundation. We will be more than happy to supply you with any and all information we have concerning this incident to assist you in the investigation of this matter.

"A carbon of this letter is being sent to Mr. Wisniski and to the President of the International Brotherhood of Electrical Workers to insure that proper notification is given to the Union pursuant to Rule 21 and also enter an attempt to help to expedite this matter.

"As you are well aware, Mr. Foust filed another claim with you on June 17, 1970, in regards to a Union Agreement violation that came to his knowledge in late May, 1970. According to Rule 21, paragraph 1, all claims not disallowed within sixty days are to be deemed allowed. Mr. Foust to this date has never received any correspondence from you in regard to this claim that he filed on June 17, 1970. You informed him in December by telephone that the Union was not going to do anything in regards to his claim due to the fact that he had retained our law firm to assist [61] him in his personal injury claim against the Union Pacific Railroad. For your knowledge and for the knowledge of Mr. Wisniski, who I understand gave you this information to convey

to Mr. Foust, Mr. Foust did not retain our firm until late November, 1970, long after the sixty-day claim period had expired. We would appreciate some acknowledgement of this claim we are herewith and appreciate any and all support the Union can give Mr. Foust in regards to this matter. As I indicated to you in our letter of January 21, 1971, Mr. Foust is presently and has always been a strong Union man. He looks forward to the Union for security and backing but is becoming very disheartened by the Union's lack of cooperation.

"If I can assist you in any way or if you require any information from Mr. Foust in regards to this claim, please let me know at your early convenience.

"Very truly yours, Edward P. Moriarity." Copy to Mr. Leo Wisniski and Mr. Pillard.

* * * *

[62] Q. (By Mr. Mackey) Mr. Foust, are you familiar with a Union rule or a contract agreement between the IBEW and Union Pacific Railroad known as Rule 21?

A. Yes.

* * * *

[63] A. "Rule 21. Discipline and grievances.

"(a) All claims or grievances arising on or after January 1, 1955, shall be handled as follows:

"(1) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the carrier authorized to receive same, within sixty days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within sixty days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a prece-

dent or waiver of the contentions of the carrier as to other similar claims or grievances."

* * * *

[66] A. "Rawlins, Wyoming, April 5, 1971.

"Dear Mr."—there is no "Dear" there.

"Mr. L. D. Foust, 1502 Adams Avenue, Cheyenne, Wyoming.

"Dear Mr. Foust:

"This with reference to letter of March 26, 1971, received from attorney Edward P. Moriarity relative to grievance in your behalf.

"It is proper procedure for the employee to make his claim or grievance known in writing to the District Chairman for consideration for handling with the carrier in accordance with provisions of the Agreement. As you are very well aware, Rule 21 provides that all claims or grievances must be presented in writing by or on behalf of the employee involved, that is why it is necessary to receive in writing authority to handle claims or grievances for further handling.

"Upon receipt of your grievance in writing, and request to the undersigned to handle your initial claim pertaining to the carrier terminating your service, it will be reviewed and handled under the proper grievance procedures of the current Agreement.

"Yours truly, D. F. Jones, District Chairman."

* * * *

[67] Q. Mr. Foust, I hand you what has been received into evidence at the Pre-Trial Conference as Defendants' Exhibit Y and ask you if that tells what the end result of your grievance was?

A. Yes, it does.

* * * *

[68] Q. Would you go ahead, Mr. Foust, and read to the jury what the text of that award is?

A. "Dispute: Claim of Employees:

"1. That Radio Man L. D. Foust was unjustly treated and the provisions of the current Agreement were violated when he was dismissed from service effective February 3, 1971.

"2. That the carrier be ordered to compensate L. D. Foust for all time lost for all regular assigned work days, reinstating him to service with all seniority and vacation rights, and all other benefits due under current agreements."

Do you want me to keep reading?

Q. Yes, please.

A. "The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as [69] approved June 21, 1934.

"This division of the Adjustment Board has justification over the dispute involved herein.

"Parties to said dispute waived right of appearance at hearing thereon.

"It is recognized that Rule 23 and Rule 24 of the Agreement are both very pertinent and would be given great probity and value, and be carefully examined. It is also recognized that a substantial question exists on the merits of this matter.

"The occurrence on which the claim is based is determination of services by the carrier, which termination was mailed to Mr. Foust, the claimant, on February 3, 1971.

"The grievance and claim was filed by Mr. D. F. Jones, District Chairman on April 9, 1971, by the employee's—" I can't make that out for sure.

Q. Submission.

A. —"submission, and on appeal"—excuse me—"and on April 6 by the carrier's submission."

And then I can't read that next line. Something as of the carrier.

Q. Would that be the line, "We shall take the most favorable date to the claimant, and use the date of April 6"? Would this one be easier for you to read? Go ahead and take a look at that.

[70] A. Okay. Right.

"We shall take the most favorable date to the claimant, and use the date of April 6, 1971, as the carrier's answer on April 13th, as shown by the record, refers to the letter of April 6th, 1971."

Q. Would you go on with it if there is more?

A. "By taking the dates most favorable to the claimant, sixty-two days passed between the occurrence and the filing of the grievance and claim.

"Rule 21-(1) says:

"All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the carrier authorized to receive same, within sixty days from the date of the occurrence on which the claim is based."

"These agreements are carefully entered into and it is the intent of both parties to see that there are no dilatory tactics. It is the same principle as a non-claim statute in Probate law, and the Statute of Limitations in law. In the absence of fraud or lack of jurisdiction, it is absolute.

"Certainly, the possibility of injustice is not a defense to this limitation.

"The purpose of this part of Rule 21 is to insure rapid handling of claims.

[71] "This claim and grievance was not filed and presented in writing by or on behalf of the employee involved, to the officer of the carrier authorized to receive same, within sixty days from the date of the occurrence on which the claim was based.

"Award.

"Claim denied.

"National Railroad Adjustment Board, by order of Second Division."

And then it is signed by the Executive Secretary, I think it is Killner.

Q. Mr. Foust, is there a third page to that exhibit?

A. And this date is at the end, "Dated at Chicago, Illinois, this 2nd day of June, 1972."

Q. Is there a third page to that?

A. Yes, there is.

Q. Would you read that to the jury, please?

A. "National Railroad Adjustment Board, Second Division.

"Order.

"To accompany Award No. 6296, Docket 6171.

"Mr. James E. Yost, President, Railway Employees Department, A. F. of L.-C. I. O., 220 South State Street, Chicago, Illinois.

[72] "The Division, after consideration of the docket identified above, hereby orders that an award favorable to the petitioner should not be made. The claim is denied as set forth in the award, a copy of which is attached and made a part of this order.

"National Railway Adjustment Board, by order of Second Division."

Signed by Killeen.

Q. All right.

Mr. Foust, as a result of any activity by the IBEW, were you ever reinstated to your employment with the Union Pacific Railroad?

A. No, I was not.

Q. Did there come a time, Mr. Foust, when you terminated any right you might have had to be reemployed by the railroad?

A. Yes, at a later date I did.

Q. When was that?

A. September 25, 1973.

Q. What was the purpose of that?

A. It finally came to a place that I had to make some kind of settlement because I had no representation left by the Union. My attorney checked out all avenues and made all phone calls and wrote every possible letter he could do, and due to no place to go, I finally decided that a settlement [73] should be reached.

Q. So as a part of your settlement with the railroad, you made that agreement to waive any further right to reemployment with the railroad?

A. Yes.

Q. Was the IBEW a party to that agreement?

A. No.

* * * *

[74] Q. Mr. Foust, based upon those computations, are you able to tell me what it is, the amount of money you would have earned based on those salaries as an employee of the railroad during the period of February 3, 1971, to September 25, 1973?

A. It has a total here of \$30,836.40.

Q. Mr. Foust, I notice you are examining a document. What is that document?

A. This is a document presented to my attorneys by [75] the Union Pacific Railroad.

Q. At your request?

A. At my request.

* * * *

[76] A. Oh, yes, there was several. I had insurance policies, I had hospitalization insurance with the Railroad Hospital Association, and I had a family policy with my family with Travelers. It covered those.

I had pass rights for traveling on the railroad and things of this nature that I also lost.

Q. Now in relation to your insurance, did your insurance terminate at a given time?

A. When they terminated my service, yes.

Q. And as a result of your lack of insurance, did you incur medical expenses?

A. Oh, yes. During this span of time here, my wife entered the hospital with a heart attack and the bills surmounted past a thousand dollars on just this one occurrence alone.

Q. And you had no insurance to cover that?

A. No.

[77] Q. Mr. Foust, had you to your knowledge done everything requested of you by anyone in regard to your leave of absence in employment with the Union Pacific Railroad?

A. Yes, I did.

Q. Is there anything you are aware of you could have done that you did not do to comply with the need for a leave of absence with the Union Pacific Railroad?

A. No. I instructed my attorney to check out every avenue and everything like this. He called everybody that he could possibly find and they gave him the final word that this was the final thing that they could do.

Q. Now in relation to prior to February 3 of 1971, prior to your termination, had you done everything the Union Pacific Railroad had requested of you?

A. Yes.

Q. Is there anything to your knowledge that you could have done in addition to what you did do in order to obtain a leave of absence?

A. No. I complied with everything they wanted and required, time limit and everything like this.

MR. MACKEY: All right.

Your Honor, at this time—I believe that these exhibits were received into evidence at the Pre-Trial, but for the purposes of the record—and I don't mean to cause some confusion—I would like to offer at this time [78] Plaintiff's Exhibits 14, 15, 16, 17 and 10.

And in addition I would like to offer as Plaintiff's Exhibits, since they are not yet before the jury, Defendants' Exhibits A, B, C, D and Y into evidence. All of those are matters that have been dealt with at the Pre-Trial Conference.

THE COURT: Do you agree, Mr. Hickey?

MR. HICKEY: Yes, I do.

THE COURT: Very well. Each of those exhibits may be received.

(Plaintiff's Exhibits 10, 14, 15, 16 and 17 and Defendants' Exhibits A, B, C, D and Y were received in evidence.)

MR. MACKEY: Thank you, Your Honor, very much. I have no further questions. You may inquire, counsel.

CROSS-EXAMINATION

BY MR. HICKEY:

Q. Mr. Foust, you testified that as a result of the accident you incurred in your employment with the Union Pacific you had medical treatment?

A. Yes, sir.

* * * *

[88] Q (By Mr. Hickey) Let's strike the word "compensation." Did you receive some money because you were off, disabled and sick?

A. Yes.

Q. How much did that amount to?

[89] A. Oh, the exact figure I can't give you, but roughly about \$250 a month.

* * * *

[90] Are you contending that the Defendant Union or any of its representatives entered into and had any part

with the decision of Union Pacific to terminate you for violation of its rules?

A. I do not know this. I do not know for sure.

Q. Are you contending that they had?

A. No.

Q. Now is it a factual statement that you will agree with that first you retained counsel in the fall of 1970 to handle your case as concerned the personal injuries you had incurred as a result of this accident and thereafter throughout the whole course of the history of this problem and that you instructed them to do everything to represent your interests?

A. Yes. I obtained my attorney to handle my claim for my injury with the railroad. At the same time I asked them if they would, due to my incapacities at this time, due to myelograms and headaches and all different problems, if they would write letters to the Union for me as I asked them to and take care of any other personal matters that came up because I was afraid that the strain around my house with my wife would come to a bad end, which it eventually did.

* * * *

[101] MR. UCHNER: 14.

MR. MACKEY: 14. Here it is, Your Honor, laying in front of Mr. Hickey at this time.

Let the record reflect the return request receipt, the document in question, is signed by Barbara Jones showing date delivered 3-27-71.

* * * *

[102] Q. (By Mr. Hickey) Let's get back right around from the time you were injured March 9, 1970, to February 3, '71. Did you have occasion to work with Mr. Jones at that time?

A. What were the dates again?

* * * *

[103] A. To the best of my recollection, no, I did not work with him then. He was in Rawlins and I was in Cheyenne.

* * * *

Q. Was he an employee of Union Pacific?

A. Yes, he was an equipment man.

Q. What is an equipment man?

A. He's the person that works with the Communication Department in just about every phase and capacity: Microwave, radio, telephone, telegraph. Basically this is the same thing as a radio man, only he is a higher scale than I am.

Q. He had a higher scale?

A. Yes.

Q. Did he work the same number of hours?

A. That would be pretty hard to determine because some of us put in some very long hours.

Q. Was the regular work schedule week the same?

A. Yes, it was basically that, yes.

Q. Do you know if he held a position with the Union [104] at the Union Pacific—not with the Union Pacific, but with the Brotherhood?

A. Yes. He was District Chairman.

* * * *

Q. (By Mr. Hickey) Do you know at what location Mr. Jones worked?

[105] A. He lived and his headquarters was at Rawlins and he was like practically every other person in the Union Pacific, had a certain district or territory to take care of.

Q. Would you know what your district was?

A. Yes. I knew what my district was.

Q. And what was your district?

A. Oh, it went to microwave sites as far as Chappell, Nebraska. I trouble shot Buckhorn Mountain which is up above Fort Collins. I trouble shoot Pilot Knob which is on the hill between here and Laramie.

Of course, other times I've ended up on different places as far as Brady, Nebraska, but that was not my assigned territory. These others were.

Q. What are the distances between the extremes of your area of work?

A. Oh, from here to Chappell approximately 125 miles, I believe. Thirty-five, forth miles up to Pilot Knob and Buckhorn Mountain would be somewhere between fifty and seventy-five miles, I imagine.

Q. Is that the area of a usual district for a communication worker?

MR. MACKEY: I object to that on the grounds it's absolutely irrelevant. It was Mr. Foust's territory. Whether it is usual, unusual or in between is neither here nor there to this case.

[106] THE COURT: What do you perceive the probative value to be?

MR. HICKEY: If it was, I'm attempting to lay the foundation if he knew at what points of work Mr. Jones would have engaged in his duties and whether it was the same district or similarly constructed district.

MR. MACKEY: I would object to the matter offered to be proved on the grounds it certainly is not the best evidence to bring in through Mr. Foust. Defendant Jones is absent from the courtroom and I have no idea whether he intends to be here or not.

THE COURT: Sustained. It is completely immaterial.

* * * *

[107] Q. (By Mr. Hickey) Looking at the days between the date of receipt of this letter and the date that the grievance was filed, the 6th, you so testified, of April, how many days in there would have constituted part of your normal work week?

A. Well, in our department it would really be hard to say on a normal work week. I mean, you never know whether you are going to be called out on a Saturday or

Sunday or whether you will be in your headquarters and everything like this.

Q. Now you testified that Mr. Jones' headquarters were Rawlins; is that right?

A. But you say the normal work week. Was this your [108] question?

Q. I said, how many days would constitute days of your normal work week? That was the question.

A. Well, there would be three days in March, the last three days of March, and first two days in April.

Q. That is five days, right?

A. Five days, yes.

Q. When was the time in which you had to file this grievance?

A. Sixty days.

Q. Sixty days. And the Union missed by two?

A. Yes.

Q. Do you have occasion at any time between shortly after April 3 when you first brought this termination letter to your attorneys' attention to handle for you and when they returned to you after March 26 and showed you the letter that they wrote to Jones, did you have occasion to ask them what they were doing for you?

A. Did I have occasion to ask my attorneys this?

Q. Yes.

A. Most of the time I instructed them what to do.

Q. Did you ask them had they filed a claim or taken any action to file a claim?

A. Yes.

Q. What did they say?

[109] A. And at that particular time they thought this was some type of error that could be cleared up with a simple matter of a letter to Mr. C. O. Jett, Superintendent of Communications, and I informed him of more or less what type of person he was, which was a little disbelief to him, and when they found this out to be accu-

rate and everything, and I told them to go to the Union and they did so.

* * * * *

[110] Q. (By Mr. Hickey) Then I asked you, did you inquire of them what they were doing and you answered that they wrote this letter to Mr. Jett. This is after February 3. And I have told you as you have that exhibit in front of you, it's dated February 11; is that correct?

A. This particular letter after the discharge, yes.

Q. Now after that letter and between that date and March 26, did you again ask them what they were doing?

A. Well, I was in communications all the time with my attorneys. I don't exactly know what your question is, what it is leading to.

* * * * *

[120] Q. During the period February 5, 1971, Mr. Foust, to April 5, 6, 7, 1971, did you ever personally communicate with Mr. Jones? Personally communicate, did you, during that [121] period?

A. What was your first date?

Q. February 5, 1971, the date you received your discharge letter.

A. No.

Q. You did not?

A. No.

Q. Did you ever communicate with Mr. Wisniski?

A. No.

Q. Did you ever communicate with any representative of the Union?

A. No. I had my attorneys do this.

Q. You had your attorneys do that?

A. Yes.

Q. Now do you know Mr. Wisniski and have you ever met him?

A. Yes.

Q. And what was the nature of your association with him or at what time?

A. You mean when I met the gentleman?

Q. Yes.

A. The first time I met him was when he was going through Cheyenne on a passenger train.

Q. What year would that be? Well, 1970, '71, '72?

A. Well, it was before this, before 1970.

[122] Q. Any time before that?

A. No.

Q. You just happened to meet him?

A. This one particular time I met him.

Q. Were you introduced to him?

A. Yes. Then I met him on another occasion also.

Q. You did meet him on another occasion?

A. Yes. I attended a local Union meeting here and he sat in on that meeting.

Q. Do you know what meeting that was, when it was? Was it in this period?

A. No. It was before 1970.

Q. Then you knew what his job was?

A. Yes.

Q. What was that?

A. He was General Chairman.

Q. Do you know what they do as General Chairman?

A. They are supposed to represent us in their Union capacity.

Q. At certain levels of your grievance handling?

A. Yes.

Q. And in connection with the negotiation of contracts; is that correct?

A. I believe this is correct.

Q. Now was there any enmity or bad relations [123] between you and Mr. Wisniski?

A. No, I couldn't really say this. At times I felt we could have been a little better represented, but this is just my opinion.

Q. Was that at about this time?
 A. Oh, I felt this at different times.
 Q. Different times?
 A. Yes. Uh-huh.
 Q. Did it have anything to do with you personally?
 A. No. It was just things that we encountered working and if we would bring up any of this for discussion or anything like this, we would sort of get brushed aside and passed over like this.
 Q. If so, that would have affected you and a number of your other co-workers; is that correct?
 A. This is correct.
 Q. Not you personally?
 A. No.
 Q. Was there any unpleasant relationship or association at any time with Mr. Jones?
 A. No. As far as Union matters go and things like this, no, I don't think there was.
 Q. Do you know of any reason why they would want to do you harm for any reason whatsoever?
 A. No, I can't truthfully say that there was.

* * * *

[125] Q. (By Mr. Hickey) Do you know what the Union did that you had a basis to complain about or did not do?
 A. That the Union?
 Q. Yes.
 A. They didn't represent me properly.
 Q. Can you explain that for us in how you feel they did not represent you properly?
 A. Well, in this one ruling here they ruled two days after the sixtieth day limit so the Union was two days late.
 Q. All right, sir. Now so they filed your claim two days late. Anything else?
 A. Well, due to that I was terminated so that just about covers everything.

Q. Is that your conclusion that due to that you were terminated?
 A. Yes. I had no recourse.
 Q. Did the Union even though two days late file a claim as you wanted it to do?
 A. Yes, two days late they did file a claim.
 Q. Did they undertake by their representative to [126] process that through every step of the appellate procedure with all the offices available on the Union Pacific?
 A. Yes.
 Q. Did they then take to final and binding arbitration before the Second Division of the Railroad Adjustment Board?
 A. Did they what?
 Q. Take it to arbitration before the Second Division of the Railroad Adjustment Board?
 A. Yes. I believe this is right through the steps they followed.
 Q. And then we can agree, can we not, that they filed it two days late and their efforts were unsuccessful; is that correct?
 A. Yes.
 Q. Is that the nature of what you think they did or didn't do?
 A. That is what all the evidence shows they did.

* * * *

[143] (The deposition of Robert Walker Taylor, M. D., was read into evidence.)

* * * *

[146] (Pages 1 through 23, Line 20, of the Deposition of Dean F. Jones were read into evidence.)

* * * *

[151] EDWARD P. MORIARITY,

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MACKEY:

Q. Would you state your full name for the record, please.

A. Edward P. Moriarity.

Q. And your occupation, Mr. Moriarity?

A. I'm a lawyer.

Q. How long have you been an attorney?

A. About five and a half years.

* * * *

[154] MR. MACKEY: No, sir. This is a letter of November 19, 1970, from Mr. Moriarity to Mr. Jones.

MR. UCHNER: We have no objection, Your Honor.

THE COURT: It may be received.

(Plaintiff's Exhibit No. 25 received in evidence.)

Q. (By Mr. Mackey) Mr. Moriarity, would you please read to the jury—

MR. MACKEY: Well, Your Honor, because Mr. Moriarity is having trouble with his voice, perhaps it would be more appropriate if I read it to the jury.

THE COURT: You may read it to the jury.

[155] MR. MACKEY: Thank you.

Ladies and gentlemen, this is Plaintiff's Exhibit No. 25 which Mr. Moriarity just testified is a letter of November 19, 1970, addressed to—

"Mr. D. F. Jones

"514 12th Street

"Rawlins, Wyoming 82301

"Re: LeRoy Foust, International Brotherhood of Electrical Workers

"Dear Mr. Jones:

"Mr. LeRoy Foust has retained our firm to represent him concerning an accident which occurred on or about March 9, 1970, while he was on duty with the Union Pacific Railroad as a radioman in the Communications Department.

"On June 17, 1970, Mr. Foust sent a letter to you regarding a claim for grievance against the carrier. Since we will be handling all facets of this accident for Mr. Foust, it would be appreciated if you would address all further correspondence and contracts regarding the above matter to this office.

"At the present time it would be appreciated if you would please give this office a status report as to what is being done regarding this grievance. It is Mr. Foust's understanding that this grievance has been forwarded on to Mr. Leo J. Wisniski, General Chairman of IBEW, in Omaha, [156] Nebraska. I am taking the liberty of sending a carbon copy of this letter to Mr. Wisniski to give him notice that we are representing Mr. Foust. We would appreciate hearing from you or Mr. Wisniski regarding the above grievance. Thank you for your co-operation in this matter.

"Very truly yours, McClintock, Mai & Urbigkit, by, Edward P. Moriarity."

Showing a copy to Mr. Leo J. Wisniski.

Q. (By Mr. Mackey) Mr. Moriarity, did there come a time when you received a response to that letter?

A. No, I did not. They never did reply to any of the letters that we wrote to them.

* * * *

[157] Q. (By Mr. Mackey) Mr. Moriarity, I hand you what has been marked for identification as Plaintiff's Exhibit No. 26. Can you identify that letter?

A. Yes. This is the letter to Mr. Jones written by me on behalf of Mr. Foust dated January 11, 1971, regarding the first grievance.

Q. All right. Mr. Moriarity, I hand you what has been marked for identification as Plaintiff's Exhibit No. 27 and ask if you can identify that?

A. Yes. This is a letter dated January 21st, 1971, to Mr. Jones with reference to the letters of November 19th and the letter of January 11th for which we had never received any reply.

Q. Those were prepared under your direction?

A. They were.

MR. MACKEY: Your Honor, at this time the Plaintiff would offer Plaintiff's Exhibits 26 and 27 into evidence.

MR. HICKEY: No objection, Your Honor.

THE COURT: They may be received.

(Plaintiff's Exhibits 26 and 27 received in evidence.)

Q. (By Mr. Mackey) Mr. Moriarity, what is the subject matter of these two letters, if you know, or take a look at them and tell the jury, please.

[158] A. Well, the letter of January 11th dealt with a telephone conversation that Mr. Jones had with Mr. Foust based on some information Mr. Wisniski had given Mr. Jones. And we had written to Mr. Jones and asked him for a copy of the letter from Mr. Wisniski so that we could get the matter straightened up.

Q. Was this in relation to a particular problem Mr. Foust was having with the Union?

A. Yes. As I recall, some time prior to the time that Mr. Foust had retained us, he had been off work to go through some physical therapy, I think it was. It's been some time ago. And he was not paid for the time that he was off work. He turned in a grievance.

Q. To whom did he turn in a grievance?

A. He turned in a grievance to the Union according to the manual of the Union to handle it in that procedure rather than go through Court or anything of that nature. There is a substantial difference between a grievance and a claim.

Q. Does the letter of January 21st or Plaintiff's Exhibit 27 relate to the same subject?

A. The letter of January 21st relates basically to the same subject matter. It was a longer letter wherein we just asked why they weren't replying to our correspondence and why they weren't doing anything on behalf of Mr. Foust.

[159] Q. There is nothing in relation to these two exhibits that would bear any question about the Union's representation of Mr. Foust in relation to his discharge; is there?

A. No. This is the first grievance that he had.

MR. MACKEY: Your Honor, with leave of the Court I would like to read these two exhibits to the jury, if I might.

THE COURT: Very well.

There is no objection to Mr. Mackey doing it instead of the witness?

MR. HICKEY: No, Your Honor.

MR. UCHNER: No.

THE COURT: Very well.

MR. MACKEY: Plaintiff's Exhibit 26 ladies and gentlemen of the jury is a letter of January 11, 1971, addressed to Mr. D. F. Jones at 514 12th Street, Rawlins, Wyoming 82301.

"RE: LeRoy Foust (International Brotherhood of Electrical Workers)

"Dear Mr. Jones:

"Mr. LeRoy Foust, has informed me that he had a telephone conversation with you on December 8, 1970, regarding his grievance against the carrier. He stated

that you informed him that it was the Union's position that since he had retained [160] an attorney, the Union was not going to have anything else to do with this matter. The information you gave Mr. Foust came to you by letter from Mr. Leo J. Wisniski, General Chairman of IBEW in Omaha, Nebraska.

"Further, Mr. Foust stated that you agreed to send him a copy of the letter that you received from Mr. Wisniski. Mr. Foust, has yet to receive a copy of this correspondence and would appreciate it if you could please send a copy of that letter to us at your earliest convenience.

"Very truly yours, McClintock, Mai, Urbigkit & Moriarity, by, Edward P. Moriarity."

Then Plaintiff's Exhibit No. 27 which is a letter dated January 21, 1971, to Mr. D. F. Jones, 514 12th Street, Rawlins, Wyoming 82301.

"RE: LeRoy Foust (International Brotherhood of Electrical Workers).

"Dear Mr. Jones:

"On November 19, 1970, and again on January 11, 1971, I wrote to you on behalf of the above-named Union member. To this date I have not received a reply from you concerning my correspondence.

"On June 17, 1970, Mr. Foust, according to the procedure laid down in Rule 21 of the Agreement between the U.P.R.R. and the IBEW, effective April 1, 1957, reported a grievance against the carrier for not complying with Rule 7, [161] Paragraph A, of said Agreement. He outlined the basis for this grievance in his letter reporting same.

"According to Mr. Foust, he was informed by you via telephone on December 8, 1970, that the Union was not going to assist him in prosecuting this grievance since he had chosen to retain independent counsel. You stated that you received this information by letter from Mr. Leo J. Wisniski, General Chairman of IBEW in Omaha,

Nebraska. Mr. Foust requested a copy of this letter and although you said that you would send him one, he has yet to receive a copy of this correspondence.

"It is the position of our client that he has been more than fair with the Union and has attempted to comply with all of their requirements. He has not received any cooperation in any matter from the Union and would appreciate knowing the reasons why.

"There is a distinction in the rules between a grievance and a claim. Mr. Foust has retained this law firm to represent him in his claim against the carrier for a personal injury which he sustained while on the job. He has also exercised his right under the Agreement to have the Union represent him in his grievance against the carrier. These are two separate and distinct items and the fact that we represent Mr. Foust in prosecuting his claim should have no bearing whatsoever on his request to have the Union represent him in prosecuting the grievance. The only possible over [162] lapping of these two separate and distinct items is the fact that Mr. Foust is entitled to full pay under Rule 7 because he was injured on the job and is not away from the job on his own accord.

"Mr. Foust has been in the past, and still remains a very strong Union man. He has always looked towards his Union for security and backing. It would sincerely be appreciated if you would please give us your views on the above-mentioned matters so that we can, hopefully, arrive at an amicable way of settling this dispute.

"If we do not receive an acknowledgement of this letter within ten days we will be forced to take the position that the Union has chosen to deny Mr. Foust his well deserved representation and we will have no alternative but to take whatever further steps are necessary to compel the Union to abide by their contract.

"Very truly yours, Edward P. Moriarity."

Q. (By Mr. Mackey) Mr. Moriarity, did there come a time when you became aware of the fact that Mr. Foust had been discharged by the Union Pacific Railroad?

A. Yes.

Q. When was that?

A. I'm not sure the exact date. I know that Mr. Foust brought a letter into the office from a Mr. C. O. Jett of the Union Pacific Railroad saying that he [163] had been discharged. The exact date that he brought it in, I don't know for sure. Some time soon after he received it though.

[168] THE WITNESS: Well, as a result of receiving that letter and discussions with my client, I wrote to [169] Mr. C. O. Jett, the Superintendent of Communications of the Union Pacific Railroad, on February 11, 1971, in which I set forth all of the facts of the case and asked him if he would reconsider the firing of Mr. Foust.

Q. (By Mr. Mackey) Did you ever receive a reply to that letter from Mr. Jett?

A. I don't think so. You know, I haven't looked at the files in a long time, but I just don't ever recall receiving a letter from Mr. Jett.

I recall some time later we waited and kept hoping for a reply and we never got any. I finally called Mr. Jett and Mr. Jett said that, well, they just hadn't had a chance to look at it and that he thought it was going to be final, but he would let me know. And he never let me know and I kept waiting and waiting.

Finally I called him and it was because I was worried; the Rule says something about sixty days that the grievance has to be filed. So, I called Mr. Jett and Mr. Jett informed me that the only avenue that we would have to handle that matter was through the Union representative and he informed me that the Union representative would be Mr. Jones in this area and to write to him and he could file a grievance on Mr. Foust's behalf.

As a result of that conversation with Mr. Jett, I did that.

[170] A. Yes. This is a letter dated March 26, 1971, to Mr. D. F. Jones and in there I said:

"Dear Mr. Jones:

"We have been informed that you are the officer of the carrier authorized to receive grievances under Rule 21 of the Agreement . . ."

I had been informed of that fact by Mr. Jett and I'm sure that I talked to him that same day or the day before getting a final reply from him that there wasn't anything that Union Pacific was going to do to reconsider.

[182] (Continued reading of the deposition of Dean F. Jones [183] beginning on page 23, line 21, to the jury.)

MR. MACKEY: At this time Plaintiff would offer into evidence as Plaintiff's Exhibit 23 the deposition exhibits attached to the deposition of Mr. Jones.

Excuse me, Your Honor, that would be Exhibit No. 24, I believe.

THE COURT: Any objection, Mr. Hickey?

MR. HICKEY: No objection, Your Honor.

MR. MACKEY: I would like to point out to the Court again some of the similar problems we have had. There are duplications in these. It seems easier at this point to leave them in tact, recognizing that there are duplications.

THE COURT: Very well.

[187] (The deposition of Leo Wisniski was read to the jury during which time the lunch recess was taken from 12:00 o'clock noon to 1:30 p.m., May 14, 1976.)

THE COURT: Mr. Mackey, the exhibits of the deposition of Mr. Jones and Mr. Wisniski should both be marked

as the next exhibits. For purposes of the record they will not be received as exhibits, but they will be marked.

MR. MACKEY: Your Honor, I believe we have offered into evidence the exhibits from Mr. Jones' deposition as Plaintiff's Exhibit 24 which were received in evidence.

THE COURT: Right.

MR. MACKEY: And the deposition, as I understand it, was marked also as an exhibit but not offered or received. I don't know exactly what that number is.

THE COURT: It was Plaintiff's Exhibit 25.

MR. MACKEY: 25. So, at this time, Your Honor, I believe that the Court Reporter has marked Mr. Wisniski's deposition. If not, we would ask it be marked in the sequential series of numbers and then I believe that would be Exhibit 28 and then Plaintiff's would offer the exhibits of the Wisniski [188] deposition as a group identified as Plaintiff's Exhibit No. 29 consisting of seventeen documents which were discussed by number and the two letters which the closing colloquy related to, letters from Mr. Wisniski's file, Your Honor. I have them right here if I can have a moment to locate them.

(Brief pause.)

Yes, Your Honor, pursuant to our agreement with Mr. Hickey, those twenty-two letters were provided and I would add them to that group of exhibits which I believe is now Plaintiff's Exhibit No. 29 and offer them at this time as that exhibit.

THE COURT: Any objection?

MR. HICKEY: No objection.

THE COURT: It may be received.

(Plaintiff's Exhibit No. 29 received in evidence.)

* * * *

[192] MR. HICKEY: I'm sorry, Your Honor.

I at this time make a motion pursuant to Rule 50 for a directed verdict on the basis that the Plaintiff

has failed to establish a prima facie case entitling him to release, [relief].

* * * *

[204] THE COURT: The Court will take the Defendants' Motion for a Directed Verdict under advisement and reserve ruling.

* * * *

[205] LEROY D. FOUST,

called as a witness on behalf of the Defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HICKEY:

* * * *

[207] Q. (By Mr. Hickey) Mr. Foust, I think we were at the point where I asked you what the monthly amount of that disability annuity was.

A. At the present day, you mean?

Q. Yes.

A. I believe it is \$351.95 a month.

Q. Each month?

A. Yes.

* * * *

[208] MR. MACKEY: Your Honor, let the record reflect that in the Answers to Interrogatories signed by Mr. Foust is a series of questions, one of which is "State the effective date of the initial payment of any annuity to you and the amount thereof."

The answer is "Physical disability, May 2, 1971, [209] to present."

* * * *

Q. (By Mr. Hickey) When you sought that annuity, did you file an application with the Railroad Retirement Board?

A. Yes.

Q. Did you state that you were physically disabled from performing the work of your job?

A. Yes.

* * * *

[211] Q. You are not working?

A. No.

Q. Or earning any money now?

A. No.

Q. Why is that?

A. Well, there are very few jobs I can handle.

Q. You said in the second Interrogatory, Mr. Foust, when I asked you what your damages were based on, the Answer as it was based on the wages you lost during the period from your discharge to the date that you executed that release and waived further employment with the Union Pacific of September 25, 1973; is that correct?

A. Did you say April 3, '71, to September 25, '73? Yes, this is right.

* * * *

[226] MR. MACKEY: Your Honor, we haven't pleaded damages beyond September 25, 1973.

MR. HICKEY: I didn't bring this in.

MR. MACKEY: You brought it in.

THE COURT: That's true, you did in your Pre-Trial Statement say that you are claiming no damages beyond that date in 1973.

MR. MACKEY: Right.

THE COURT: I have had the feeling though in the course of this trial that you were claiming more than that.

MR. MACKEY: We have claimed mental anguish, pain and suffering and the like, Your Honor, but we do not expect compensation, nor will I argue to the jury that

we are [227] entitled to compensation beyond that date. That has always been my position.

* * * *

[232] MR. UCHNER: If the Court please, at this time, Your Honor, all the evidence in the case having been closed, the Defendants will renew their Motion for a Directed Verdict pursuant to the Rule.

THE COURT: Upon previous grounds?

MR. UCHNER: Based upon the previous grounds and for the previous reasons that this case should be decided as a matter of law and it would certainly be impossible to submit it to the jury.

THE COURT: Mr. Mackey?

MR. MACKEY: Well, Your Honor, I would resist Mr. Uchner's Motion for, I think he said, Directed Verdict and would in fact move for a directed verdict on behalf of the Plaintiff on the question of the breach of duty of the Union on the grounds that the Union has presented no evidence showing any reasonable excuse for their failures; the failures are clear and undisputed; and would ask not only that the Defendants' Motion be denied—and I haven't responded to the particular points therein, Your Honor, that were raised the [233] first time—but would ask in fact that the Court direct a verdict in favor of the Plaintiff and submit it to the jury on the question of what damages we might be entitled to as a result of it.

THE COURT: You wish to respond to the Plaintiff's Motion?

MR. HICKEY: No, Your Honor.

THE COURT: Gentlemen, the Court feels in this case that there is a basis, admittedly not the strongest one could ever imagine, but there is in my judgment a basis on which under the instructions that I'm going to give in this case where the jury might possibly find that the actions of the Defendants were arbitrary or capricious. And on that basis, I'm going to let the case go to the jury.

(The Court reviewed proposed instructions with counsel.) (Trial proceedings recessed 4:10 p.m. and reconvened 4:15 p.m., May 14, 1976, and the following proceedings were had in the presence and hearing of the jury:)

* * * *

[234] MR. MACKEY: * * *

* * * *

[241] Then I want to talk to you about punitive damages. The Judge will tell you later on in his instructions what the measure of those are. He will tell you some other things like the burden of proof which is mine, ours, Mr. Foust's, beyond a preponderance of the evidence; the case wherein the evidence must be more logically on the side of Mr. Foust than against him.

In the event that that is true, and it is, then you must find in favor of Mr. Foust and assess the damages. Those burdens are ours and we recognize it and one of those burdens we have is to show if we are entitled to punitive damages, and we are; that the Union acted in a wanton manner. The Union acted in such a way as to hostilely discriminate against Mr. Foust or members of that class. And I'm telling you that Mr. Foust is a member of a very interesting class of people. He is a member of the International Brotherhood of Electrical Workers. And if the [242] International Brotherhood of Electrical Workers displays to you this distain and does not appear here to defend, why should they have any more respect for their membership? If the Union Pacific hires out of the IBEW those people like Mr. Jones who is now in management and moved up and over and just, you know, is getting along fine now with the railroad, if that's the system and that system operates under the circumstances that this Union has operated, that Mr. Foust is not only entitled to punitive damages, he is entitled to every penny of the punitive damages we have asked to tell that Union that

they will not distainfully reject their members, do as they please and then try to cover it up. Because that's not proper and a little judgment in this case won't make a bit of difference to that large Union that covers the entire Union Pacific System and its members are System Federal No. 105 that signed for six different crafts and all of these people who work along the system and who pay their dues into that Union. Mr. Foust did for seventeen years every month pay his dues into that system and then when the time came to rely on them, he couldn't rely on them.

If that is the attitude of that Union toward their members, then you give us punitive damages in the amount of \$75,000 which we have prayed for. We are not only entitled to it, but it is specifically to punish the Union, to tell them that this kind of conduct in relation to their members [243] will no longer be tolerated.

And anything else than that will not do it. A little judgment in this case will not do it. We have to have the Union sort of tapped on the shoulder to say "Pay attention to your members" and you as members of the jury are the only ones here who can do that. And I ask you to do that, not on behalf of Mr. Foust, but on behalf of those people who suffer from that attitude that the Union has displayed in this courtroom and that the Union has displayed in its conduct of two grievances for Mr. Foust.

Now, if you have the question "What is it the Union did?" I'm going to ask you to wade through those exhibits again. I'm going to tell you that my view of them is it is easiest for you to look at the two series of exhibits offered from the deposition of Mr. Jones and Mr. Wisniski who displayed that attitude, that distain for their membership, that failure to act in a timely manner, when talk is so easy. Instead of typing those letters in Omaha, Nebraska, and sending them to Mr. Foust saying "Forget it, Mr. Foust, we don't recognize your attorney, we don't

know who he is, we don't know he exists;" which was not true because Mr. Wisniski and Mr. Jones both told you it was not true.

Wouldn't it have been just as easy to have prepared a request for a continuance if that was necessary [244] or to have simply sent that letter dated April 6, April 8, April 9? Fortunately—no, it is not fortunate because the results is the same in any event, but at least the Railroad Board of Adjustments said "We're going to take the date most favorable to Mr. Foust and that's April 6." There is a lot of evidence that that grievance was not filed on April 6 but was in fact filed at some later time and those dates were altered and changed by Mr. Jones to make it look as best it could for the Union.

Did he miscalculate? I don't know. I hope he calculated better than Mr. Wisniski did during his deposition because he didn't know and wouldn't count and didn't bother to count and didn't want to count. And we dragged it out of him finally to sit down and add them up one, two, three, four, five. And that's another manifestation of the attitude.

So, ladies and gentlemen of the jury, I am going to leave you with this thought: I have the opportunity of rebuttal and I will use it because I have the burden of proof. But I am going to leave you with this thought: You six people are the only people in this courtroom who can tell that Union that their conduct will not be acceptable under the circumstances they displayed in this case. Therefore, I want you to go in the jury room, I want you to deliberate on this and I want you to come back with a full measure. Please don't give us half a measure; give us a full [245] measure. We want what we ask for in this case because that's the only way that the jury can tell the Union that they are not going to tolerate this kind of conduct.

Thank you very much.

* * * * *

[258] THE COURT: ***

Members of the jury: The time has come for the Court to instruct you as to the law applicable to this case.

First I must state that indispensable as are the final arguments of counsel, nonetheless they cannot be considered as evidence.

The evidence likewise offered at the trial and rejected by the Court or stricken from the record by order of the Court should not be considered by you, nor should the opening statements of counsel or the remarks of the Court [259] or the remarks of counsel in the course of the trial. All of these are not evidence and none of these should be considered by you in arriving at your verdict.

Also the Court did not by any words uttered during the course of the trial and the Court does not by these instructions give or intimate or wish to be understood by you as giving or intimating any opinions as to what has or has not been proven in this case, nor as to what are or are not the facts of the case. And no single one of these instructions states all of the law applicable to the case, but all of these instructions must be considered together as they are connected with and relate to each other as a whole.

You are instructed that the Plaintiff has brought this action against the Defendant International Brotherhood of Electrical Workers, the Union of which the Plaintiff was a member, and the Individual Defendants Jones, Wisniski and Gladney as officers of that Union, claiming damages for breach of a statutory duty to fairly represent the Plaintiff as a member of the bargaining unit and for breach of the agreement between the Plaintiff and the Defendant Union to represent the Plaintiff fairly in connection with a grievance procedure which was occasioned by the alleged wrongful discharge of the Plaintiff by the Union Pacific Railroad.

The Plaintiff contends that his employer wrongfully discharged him on February 3, 1971, for the reason that he [260] had allegedly failed to file for a leave of absence, when in fact he had applied for such a leave. And that pursuant to Rule 21 of the Agreement of the Defendant Union with the Union Pacific Railroad Company, a Notice of Grievance was required to be filed within sixty days of the date that the grievance occurred. The Plaintiff contends that he requested the proper Union official to file the grievance but that Union official failed and refused to file it within the sixty-day period and that the grievance was consequently denied on the grounds that it was not timely filed.

The Plaintiff claims \$75,000 actual damages and punitive damages in the amount of \$75,000.

The Defendants have denied the allegations of the Plaintiff that they were guilty of gross non-feasance and hostile discrimination in arbitrarily and capriciously refusing to process the Plaintiff's grievance, and refusing to file it timely, and further content that the Plaintiff has been compensated by a private settlement with the Union Pacific Railroad Company for the alleged wrongful termination of his employment.

Thus, the issues that you are to determine in this action are these: First, whether or not the Plaintiff was a member of a Defendant Union; second, whether or not the Defendant Union under its labor agreement was obliged to represent the Plaintiff at grievance procedures with the [261] Union Pacific Railroad Company; third, whether or not the Defendants breached an agreement with the Plaintiff and a duty to represent him fairly in grievance procedures; fourth, whether or not the Defendants were guilty of gross non-feasance and hostile discrimination in arbitrarily and capriciously failing to process the Plaintiff's grievance; fifth, whether or not the Plaintiff was damaged by the action of the Defendants; and sixth,

whether or not the Plaintiff is entitled to punitive damages.

Now, under our system of Civil Jurisprudence, it devolves upon the Plaintiff, the party who brings the action, to prove the material allegations of his complaint by what is known as a preponderance of the evidence. This is not a technical definition of the term "preponderance of the evidence" but it simply means that the evidence produced or offered on behalf of the Plaintiff must weigh a little more than the evidence offered in opposition to the claim.

By "preponderance" is not meant the number of witnesses but is meant the weight and the credit to be given to their respective testimony.

If you find that the evidence offered on both sides is of equal weight, then the Plaintiff cannot recover because under those circumstances he has failed to sustain the burden of proof which the law imposes upon him.

There are generally speaking two types of evidence [262] from which the jury may properly find the truth as to the facts of a case. One is direct evidence such as the testimony of an eye witness. The other is indirect or circumstantial evidence, the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires the jury to find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Now, during the trial of this case certain testimony was read to you by way of deposition consisting of sworn written answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties to the case. The testimony of a witness who for some reason cannot be present to testify from the witness stand may be presented in writing, under oath in the form of a deposition and such testimony is entitled to the same consideration and is to be judged as to

credibility and weighed and otherwise considered by the jury insofar as possible in the same way as if the witness had been present and had testified from the witness stand.

You are instructed to ignore any evidence relating to whether or not the Plaintiff was wrongfully discharged from employment by the Union Pacific Railroad Company. The Defendant Union and its representatives did not participate [263] in any aspect of that decision and there is no charge in the Complaint involving the Union in regard to whether or not the Plaintiff had or had not observed the rules of the carrier which were stated as a basis for the termination of his employment by the railroad.

You are also instructed that a claim by a former Union member against a Union for breach of its duty of fair representation is a separate and distinct claim which the member has and is apart from any right which the employee may have or may have had against his employer. Thus, if you find from a preponderance of the evidence that the actions of the Union have caused damage to the Plaintiff independent of any actions which the employer may have taken, you may award such damages as the evidence shows the Plaintiff incurred.

You must first determine whether the Union and its officers had a duty to represent the Plaintiff, fairly and efficiently, in a grievance proceeding. If there was that duty, then you must decide whether the Union and its officers failed to perform that duty. If they performed that duty, you shall return a verdict of no cause of action. If they failed to perform that duty, you shall return a verdict for the Plaintiff.

You are further instructed that the Plaintiff must show more than that the Union did not press his grievance. [264] You must find by a preponderance of the evidence that the Union in failing to process the grievance acted arbitrarily, capriciously or in bad faith. However, you are also instructed that a Union may not arbitrarily

ignore a meritorious grievance or process it in a perfunctory manner.

You are instructed that the term "arbitrary and capricious" are synonymous and refer to an act done without an adequate principle or an act not done according to reason and judgment. Whether an act is arbitrary or capricious must be judged on the basis of whether the act complained of is reasonable or unreasonable under the circumstances.

You are instructed that the term "bad faith" implies a breach of faith or a willful failure to respond to plain and well understood obligations.

If you find that the Defendant failed to perform a duty owed to the Plaintiff, then you must determine the amount of damages sustained by the Plaintiff as a result of that breach of duty. The measure of damages to be considered by you includes all of the salary and wages, overtime pay, vacation pay, insurance, seniority and fringe benefits which the Plaintiff would have received during the period he would have been working for the railroad company.

In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrong [265] doer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If the jury should find from a preponderance of the evidence in the case that the Plaintiff is entitled to a verdict for actual or compensatory damages; and should further find that the act or omission of the Defendants, which proximately caused actual injury or damage to the Plaintiff, was maliciously, or wantonly, or oppressively done; then the jury may, if in the exercise of discretion they unanimously choose so to do, add to the award of actual damages such amount as the jury shall unanimously agree to be proper, as punitive and exemplary damages.

Now, an act or failure to act is "maliciously" done, if prompted or accompanied by ill will, or spite, or grudge, either toward the injured person individually, or toward all persons in one or more groups or categories of which the injured person is a member.

An act or a failure to act is "wantonly" done, if done in reckless or callous disregard of, or in difference to, the rights of one or more persons, including the injured person.

An act or a failure to act is "oppressively" done, if done in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of [266] authority or power, or by taking advantage of some weakness, or disability, or misfortune of another person.

Whether or not to make any award of punitive and exemplary damages, in addition to actual damages, is a matter exclusively within the province of the jury, if the jury should unanimously find, from a preponderance of the evidence in the case, that the Defendants' act or omission, which proximately caused actual damage to the Plaintiff, was maliciously or wantonly or oppressively done; but the jury should always bear in mind that such extraordinary damages may be allowed only if the jury should first unanimously award the Plaintiff a verdict for actual or compensatory damages; and the jury should also bear in mind, not only the conditions under which, and the purpose for which, the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any part to the case.

You are further instructed that Rule 21 entitled "Discipline and Grievances" reads in part as follows: "(1) All claims or grievances must be presented in writing by or on behalf of the employee involved to the officer of the [267] carrier authorized to receive same within sixty days from the date of the occurrence on which the claim or grievance is based."

In other words, the grievance need not be presented only by the employee, but may be presented by some other person such as his personal attorney acting on behalf of the employee or by the Union.

Upon retiring to the jury room, you will select one of your number to act as a foreman or forewoman. The foreman or forewoman will preside over your deliberations and will be your spokesman in Court.

The Court will provide you with two verdict forms which have been prepared for your convenience. The first verdict form reads:

"We, the jury in the above-entitled action, unanimously find in favor of the Plaintiff, LeRoy Foust, and against the Defendants, International Brotherhood of Electrical Workers, et al., and assess the Plaintiff's actual or compensatory damages in the sum of \$" blank line. And if you are going to sign the verdict form by unanimous agreement, then you would fill in the amount which you believe the Plaintiff would be fairly entitled.

It continues: "In addition to the actual damages awarded above, we, the jury unanimously award the Plaintiff, LeRoy Foust, punitive and exemplary damages in the [268] sum of \$" blank line "against the Defendants International Brotherhood of Electrical Workers, et al."

If you decided that punitive damages were proper in this case under the rules that I have just read you, then you could fill in that blank line and then date it and the foremen or forewoman would sign the verdict.

The other form of verdict reads:

"We, the jury duly empanelled in the above-entitled action and upon the issues joined do find generally for the Defendants and against the Plaintiff."

I think that's self-explanatory and there is a place to fill in the date and sign it. And this is the form that you will use in the event that the jury were to unanimously find against the Plaintiff and for the Defendants in the case.

When you have reached unanimous agreement as to your verdict, the foreman or forewoman will fill in the date and sign the verdict form and then return to the courtroom with the completed form.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the Bailiff, but bear in mind you are not to reveal to the Court or to any other person who the jury stands numerically or otherwise on the question before you until after you have reached a unanimous verdict.

[269] You may take the exhibits with you into the jury room; that is, all of the exhibits that have been received in evidence except the three depositions.

With that, ladies and gentlemen of the jury, I will ask you to retire for a moment while we consider any possible suggestions or objections that counsel may have to these instructions.

* * * *

[270] MR. UCHNER: If the Court please, the Defendant would take exception to the instruction which the Court gave on punitive damages. We believe that it is error to give such an instruction because the evidence in this case as reflected in the record does not justify such an instruction. There is no testimony in this record pertaining to bad faith or arbitrary, capricious acts, the necessary elements for punitive damages.

The only way in which the jury could return such an award would be based upon speculation, conjecture or passion.

Under the law of this Court and based on the Tenth Circuit and also I believe contained in a memorandum brief which Mr. Hickey submitted at the time that we filed the Motion for Summary Judgment, there are many other authorities stating that it has to be a clear showing in the record. We sincerely believe it is error to give such an instruction to the jury on this element of damage.

* * * *

[271] MR. HICKEY: As you know, we did comment that my understanding of the law is that in denial of fair representation cases, punitive damages are not a proper element. I should therefore say we add that as a reason why no instruction on punitive damages should have been given or that they should not consider punitive damages and an instruction of that type should have been given.

* * * *

THE COURT: Very well. The Court will leave the instruction as given.

* * * *

[272] Members of the jury, you will harken unto your verdict.

"We, the jury in the above-entitled action, unanimously find in favor of the Plaintiff (LeRoy Foust, and against the Defendants, International Brotherhood of Electrical Workers, et al., and assess the Plaintiff's actual or compensatory damages in the sum of \$40,000.

[273] "In addition to the actual damages awarded above, we, the jury, unanimously award the Plaintiff, LeRoy Foust, punitive and exemplary damages in the sum of \$75,000, against the Defendants, International Brotherhood of Electric Workers, et al."

Members of the jury, was this and is this your verdict?
(Affirmative response.)

* * * *

[275] (Trial proceedings adjourned 8:40 p.m., May 14, 1976.)

PLAINTIFF'S EXHIBIT 29

System Federation #105
 Room 308 Kane Bldg.
 P.O. Box 1631
 Pocatello, Idaho

Date April 17, 1968

Re: Handling Grievances with Carriers
 and progressing same to National
 Railroad Adjustment Board.

Circular:

To all Local Chairmen
 Union Pacific Railroad
 Portland Terminal Railroad

Dear Sirs and Brothers:

This letter is intended to bring to your attention the importance of proper preparation of claims and Grievances and to supplement the information contained in the booklet entitled "Guide for Handling of Grievances with Carriers."

You have from time to time received information from this office relating to this subject and because of our experienceing some difficulty with cases when progressing with management and preparing for handling with the adjustment Board we find many times that pertinent information of facts and evidence in support of claims is not in the record.

Local Chairmen should bear in mind the fact that every claim or grievance is a potential Board case and should be prepared as such. We list below some very important things that must be in your original claim when presented in writing to the officer of the Carrier (Master

Mechanic and or Superintendent in case of Open shops) designated to handle such matters which must be made within the time limits as set out in the agreement of August 21, 1954.

(1) When a claim or grievance is given to the Local Chairman to handle he should investigate the matter thoroughly to determine if a violation did take place and if so he should gather all pertinent *facts and evidence to support these facts* so he can present same in support of his claim.

(2) In presenting this written claim or grievance the record should state (a) The name of claimant, his location and assignment, classification, and availability. (b) The time, date and place of violation (c) The type of work performed by whom, and on what equipment. (Engine, car numbers, machinery etc.) (d) The amount of time claimed and (e) The agreement rules which were violated.

We again reemphasize that all of the above is very important and particularly, that you must be able to support your claims with documented evidence such as witnesses statements, pictures, or statements from employees on how the rules have been applied etc.

Where conferences with Local Shop Foreman or General Foreman are held in accordance with rule 35 a brief memorandum should be kept in the record to show an attempt was made to adjust the matter with them and what the results of the conference were.

We sincerely hope this letter will be of some help to you in your preparation of future claims or grievances and with best wishes we remain.

Fraternally yours,

/s/ C. S. Poole
C. S. POOLE, President
System Federation #105

/s/ H. F. Parkin
H. F. PARKIN
Secretary-Treasurer
System Federation #105

DEFENDANTS' EXHIBIT S

No. C 74-50 Civil
Defendants' Exhibit 19
9-66-8M

Form 222

UNION PACIFIC RAILROAD COMPANY

Draft No. 11228-WLW

RELEASE OF ALL CLAIMS

In consideration of the payment to me of the sum of Seventy-Five Thousand Dollars (\$75,000.00#) by Union Pacific Railroad Company (Less \$2,682.98 sickness benefits received under Railroad Unemployment Insurance Act) receipt whereof is hereby acknowledged, I do hereby release and discharge Union Pacific Railroad Company and all other parties whomsoever, from any and all claims and liability of every kind or nature, INCLUDING CLAIMS FOR INJURIES, IF ANY, WHICH ARE UNKNOWN TO ME AT THE PRESENT TIME, arising out of an accident on or about March 9th, 1970, at or near Speer, Wyoming, resulting in injuries to my person, which, as I claim, have totally and permanently disabled me from ever performing the duties of my employment; and in consideration of the amount provided to be paid me by the terms of this agreement, receipt of which is hereby acknowledged, I hereby waive any possible right of future employment. I also waive any claim for alleged wrongful discharge against Union Pacific Railroad Company and its employees or former employees.

The above payment is made and accepted in compromise settlement of disputed claims and is not an admission of liability.

No promise of future employment, or other promise of any kind, has been made to me in connection with this settlement.

I have read the above and understand it is a full release of all my claims.

Signed at Cheyenne, Wyoming this 25th day of September, 1973.

/s/ Leroy D. Foust
 LEROY D. FOUST
 Cheyenne, Wyo.
 Sept. 25, 1973.

Witnesses:

/s/ [Illegible] 9/25/73

/s/ [Illegible] 9/25/73

/s/ [Illegible] 9/25/73

I hereby acknowledge receipt of a copy of this release today Sept. 25, 1973.

/s/ Leroy D. Foust

DEFENDANTS' EXHIBIT Z

Cheyenne, Wyoming

September 25, 1973

Mr. R. H. Brenneman
 Superintendent of Communications
 Union Pacific Railroad Company
 Omaha, Nebraska

Dear Mr. Brenneman:

Please accept this as my resignation from the employ of Union Pacific Railroad Company, effective February 3, 1971.

Very Truly Yours,

/s/ Leroy D. Foust
 LEROY D. FOUST
 Sept. 25, 1973

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C 74-50

—
LEROY FOUST,
Plaintiff,
—vs—

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;
D. F. JONES, District Chairman in his Representative Capacity; LEO WISINSKI, General Chairman in his representative capacity; and FRANK T. GLADNEY, International Vice President in his representative capacity,
Defendants.

—
DEPOSITION UPON ORAL EXAMINATION
OF DEAN F. JONES

9:30 o'clock a.m.

October 3, 1975

Umatilla County Courthouse
Pendleton, Oregon

[4] Q Mr. Jones, would you state your name please.

A Dean F. Jones.

Q Where do you live, sir?

A 930 Madrona Avenue, Hermiston, Oregon.

[5] Q What's your occupation?

A Assistant manager, communications facilities, Union Pacific.

Q For a certain division?

A Not necessarily.

Q You are stationed out of Hermiston, Oregon?

A Yes. I am stationed in Hermiston.

[8] Q Directing your attention to the period 1970, '71, at that time did you hold any position as an officer or representative of the International Brotherhood or of the local of the IBEW?

A I did. District chairman.

Q Would you tell me whether district chairman is a position with the local or with the International?

A With the International.

[9] Q And what is the area of your assigned responsibilities as district chairman?

A The area would be the eastern district of the Union Pacific.

Q So that responsibility would encompass more than the local of which you were a member?

A Correct.

Q That's district chairman?

A District chairman.

* * * *

Q Would you describe to me the responsibilities of district chairman?

A Filing and handling of claims and grievances of men in the craft.

Q Were there other persons of a like position for the same geographical area with your local?

A No.

Q You were the only district chairman for the men [10] that were in your particular territory; is that correct?

A Yes.

* * * *

[46] Q And that contact was after you had received the letter of March 26th, Deposition Exhibit 9, and before you mailed Number 10; is that correct?

A I believe it was.

Q With whom was that contact?

A With Mr. Wisinski.

Q Would you state to me what you said to him and what he said to you? First by what medium if you know, sir?

A I think I called Mr. Wisinski on the phone.

* * * *

Q Do you have any recollection at all of the subject matter?

A I think we talked about this letter here from Mr. Moriarity or whatever his name is, yes. I think we talked about this letter.

Q Based upon that discussion, then, was a decision made that Mr. Moriarity's letter would not be accepted as a [47] request to file a grievance?

A I believe it was.

Q Who made that decision?

A Well, I guess I did.

Q Upon whose direction?

A I can't say.

Q Well, to go back, if Exhibit 10 was typed by Mr. Wisinski or through his office, did you tell him what to put in that letter that you were then going to sign?

A I don't know whether I did or not.

Q Would you state whether it was Mr. Wisinski or you that first raised the question of refusing to accept the request because it came from Mr. Moriarity rather than personal signature of Mr. Foust?

A I don't know which one of us raised the question.

Q Had you ever raised such a question at any time prior thereto in your exercise of responsibility in behalf of the union?

* * * *

[49] Q Would you tell me at this time whether or not you knew that rule 21 had a 60 day time limitation for filing a grievance?

A Yes.

Q Will you state whether or not that fact was known to you on or after March 26, 1971 and before April 5th, 1971?

A Yes. It was well known.

Q Would you state whether or not you took it into consideration when you discussed the matter with Mr. Wisinski and when you sent the letter back to Mr. Moriarity?

A I am quite sure that it had been taken into consideration. Whether it was or not, I don't know, but I am sure that it should have been.

Q But was it?

A I can't say whether it was or not. I am sure that it would have been.

Q You say you are sure it would have been?

A Yes.

Q What was the last date that the grievance could be filed?

A I don't have that right in front of me here. I would have to look.

Q You are aware of the fact, are you not, that when the grievance was filed, that it wasn't timely?

[50] A I feel it was probably untimely, yes.

Q Are you aware of the fact that it was not untimely when you received the letter which is marked as Deposition Exhibit 9?

A It appears to not have been untimely. I don't know when I received this letter, when I first got home to see it.

Q Would you state to me, sir, as you recall, whether or not you discussed the date of incident which was the subject matter of Mr. Moriarity's letter, Deposition Exhibit 9, with Mr. Wisinski in this contact sometime before April 5th, 1971?

A I could not tell you. It has been so long I don't remember.

Q Would you state whether or not in accordance with your recollection whether there was any discussion about the 60 day limitation and when it might fall?

A I don't know.

Q Would you tell me whether or not you gave any consideration to telephoning Mr. Foust and advising him that you were rejecting his request or rejecting this request to file a grievance?

A No.

Q At this time, then, you are simply not able to say whether you took into account the question of the 60 day [51] limitation. And the response that you made which is dated April 5th?

A I don't know whether it was taken into consideration or not.

Q Directing your attention, then, to Exhibit 10, would you tell me wherein you obtained the information, if you obtained it yourself, that it was necessary to receive in writing authority to process the claim or grievance, and directing your attention to the second paragraph of the exhibit?

A I don't know where I received the information.

Q Can you state whether or not there is any such requirement in rule 21?

A At this time, without reading rule 21, I don't know.

Q I will hand you the contract and it probably would be better to have it marked.

(Plaintiff's Deposition Exhibit Number 17 was marked for identification.)

THE WITNESS: It is in rule number 21.

Q (BY MR. URBIGKIT:) Okay. Would you state to me the language?

A The language?

Q Yes.

A All claims or grievances must be presented in [52] writing by or on behalf of the employee involved to the officer of the carrier authorized to receive same within 60 days from the date.

Q Would you state to me how that relates to your requirement that the request to file the grievance by you

meant that it could not either be in behalf of the employee . . .

A I don't believe I understand the question there.

Q You had received a request in writing on behalf of the employee that you file a grievance, had you not, by Exhibit Number 9?

A Yes.

Q And that request was in writing?

A Right.

Q The request from an attorney from whom you had received three prior letters at least with reference to his representation of Mr. Foust?

A Right.

Q Would you then explain to me what provision of the rule caused you to refuse to accept that written request in behalf of the employee as your basis for representing a member of your union in filing the grievance?

A Which letter are we referring to, sir?

Q This letter here.

A Oh. I don't know.

Q Isn't it a possible fact that you didn't type [53] Exhibit Number 10 as well as several of these other exhibits but rather that it was typed and mailed to you for you to sign, date and mail?

A That's possible.

Q And then isn't it a probable fact, not a possible fact, but probable fact that the decision which is reflected there in Exhibit 10 was not made by you but rather was made by whoever prepared the letter, typed it and mailed it to you to sign?

A I wouldn't know whether it was or not.

Q Well, do you know that you made the decision?

A No. I don't know that I did or that I did not.

Q And you don't know whether you made the decision in consideration of the fact that the limitation of 60 day time limit was or had by that time expired?

A No.

Q Directing your attention to Exhibit Number 15, again I believe you testified previously, have you not, that you don't know whether you typed that document?

A No, but I probably didn't. I imagine it was probably typed by Wisinski and signed by me.

Q There is a "never" inserted in the letter in ink. Would you state whether or not that was inserted by you?

A I think it was.

Q You examined the letter and found out that it did [54] not reflect what you wanted and that word was inserted?

A Apparently so.

Q Do you recall specifically?

A No, I don't.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C 74-50 Civil

—

LEROY FOUST,

Plaintiff,

—vs—

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;
D. F. JONES, District Chairman in his representative capacity; LEO WISNISKI, General Chairman in his representative capacity; and FRANK T. GLADNEY, International Vice President in his representative capacity,
Defendants.

DEPOSITION OF LEO WISNISKI

210 Sunset Park
1860 Larimer Street
Denver, Colorado

February 23, 1976
APPEARANCES:

TERRY W. MACKEY, Esq.,
For the Plaintiff.

WILLIAM J. HICKEY, Esq.,
For Defendant I.B.E.W., and
Leo Wisniski.

The deposition of LEO WISNISKI, produced, sworn and examined upon his oath on the 23rd day of February, 1976, at 1:30 o'clock p.m., at 210 Sunset Park, 1860

Larimer Street, [2] Denver, Colorado, before me Nancy Newton Fuller, a Certified Shorthand Reporter, a Notary Public within and for the City and County of Denver, State of Colorado, pursuant to Notice and the Federal Rules of Civil Procedure, for the examination of the said LEO WISNISKI, a defendant called for examination by the plaintiff herein, in a certain suit and matter in controversy now pending and undetermined in the said District Court, being No. C74-50 Civil.

* * * * *
EXAMINATION

[4] BY MR. MACKEY:

Q Would you state your full name?

A Leo Wisniski.

* * * * *

[5] What is your present address, Mr. Wisniski?

A 5636 Spring Street, Omaha, Nebraska.

Q How long have you resided there?

A Twelve years.

Q What's your present occupation?

A International Representative 10th District, International Brotherhood of Electrical Workers.

Q And how long have you been so employed?

A November 1st, 1974.

Q Prior to November 1st, 1974 did you also work for the I.B.E.W.?

A I was General Chairman Systems Council No. 3.

Q How long did you occupy that—

A Twelve years.

Q You are going to have to let me finish the question.

[6] MR. HICKEY: Leo, excuse me just a second. This very pleasant young lady has a job and she can't hear two voices.

Q (By Mr. Mackey) How long were you employed as General Council—or what was the position that you had?

A General Chairman.

Q How long were you employed at that?

A Twelve years.

Q During the period 1970 and '71 you were so employed as General Chairman?

A Correct.

Q Now, would you describe for me briefly what the duties of General Chairman are?

A General Chairman handles all and settles all claims and grievances after they have been handled on the local level, and the final handling with the Carrier prior to submitting to National Railroad Adjustment Board.

Q Would you describe please what you mean by handling the claims; what steps you take to handle those claims?

A It would be the steps after a District Chairman had filed a claim under the terms of the agreement, and when he is rejected the claim and the file is sent to the General Chairman for the final handling with the Carrier.

* * * * *

[7] Q All right. Mr. Wisniski, what is your educational background?

A High school and then electrical school at Westinghouse, and the service.

* * * * *

[29] Q When did it first come to your attention that Mr. Foust had a claim or grievance against the Carrier in writing?

That's not very artfully phrased.

When did it first come to your attention in writing that Mr. Foust had a claim or grievance against the Carrier?

[30] A I don't know of any claim.

Q Would your file reflect whether or not you ever became aware of the fact that Mr. Foust had a claim against the Carrier?

A You mean an injury claim?

Q No, grievance?

A A grievance. Well, after he was removed from service, yes.

Q When was that?

A Well, like I said, I thought he got removed on February 4th.

Q Would your file reflect when you first became aware of Mr. Foust's claim—or grievance, excuse me?

A I believe that I—yes, February the 5th is when I found out about it.

* * * *

[35] You have had an opportunity to examine Plaintiff's Exhibit No. 10?

A Yes.

Q Do you know where that letter was typed?

A Oh, I don't know; I may have typed it for him at his request, but I don't know whether that's the exact one, whether [36] he retyped it or not, I don't know.

Q All right. Would you look at Plaintiff's Exhibit No. 10(a), which is the next document down, and please compare Exhibit 10 to Exhibit 10(a)?

A Yes.

Q Do they appear to be the same?

A Have I got the right one?

Q Yes.

Do they appear to be the same?

A Well, whether they're the same or not I don't know. The letter is the same.

Q My question is do they appear to be the same?

A You got me.

Q In fact the lines, if you will look at the first line of the letter Exhibit 10(a), it ends in the word "received", does it not?

A Yes.

Q And the line in the Exhibit 10—the first line—ends in the word "received".

In fact, the text of these two letters are exactly identical; isn't it?

A Well, it could be.

Q Would you look at them and please read them and tell me whether or not they are?

A Well, they could very well be.

[37] Q Read them, sir, and—

A I have read them.

Q All right. Is the text identical then?

A They appear to be.

Q All right. Now, the only difference that I note is the difference of a handwritten date of April 5, 1971 and the signature D. F. Jones appearing on Plaintiff's Exhibit No. 10.

A That's right.

Q Otherwise Plaintiff's Exhibit No. 10(a)—which is also marked Defendant's Exhibit 8 and U.S. District Court Wyoming Defendant's Exhibit H—that appears to be the only difference in those two letters?

A Yes.

Q Isn't it a fact, sir, that the letter dated April 5, 1971 and signed by D.F. Jones was prepared in your office?

A Yes; I told you that.

Q And you sent—

A By request of him; but I sent it to Jones, yes.

Q And Mr. Jones sent it to Mr. Foust?

A Yes, I assume he did.

Q And Plaintiff's Exhibit 10(a) is a copy of a letter taken from your files, isn't it?

A Boy, I don't know whose file it is.

Q Would you look in your file and see if you have a copy of a letter that appears to be identical or similar to [38] Plaintiff's Exhibit 10(a)?

A No, I haven't got everything here, so I —

Q Now, going back to Exhibit No. 9, the letter of March 26, 1971; do you know when that letter came to your attention?

A Of what?

Q The letter of March 26th, 1971.

A I can't recall whether he called me about it, I don't know, about the letter coming. I think he may have called me.

Q Do you remember when—

A No, I would have no idea.

Q Do you remember when, in relation to the time that you received a copy of Plaintiff's No. 9?

A No, I do not.

Q After you received notice of the facts in Plaintiff's Exhibit No. 9 and the call from Mr. Jones, what did you do? Did you then cause Plaintiff's Exhibit 10 and 10(a) to be prepared?

A He requested it of me.

Q By telephone?

A Yes. Ordinarily it wouldn't be done, but he requested that. I told him what he had to do, so then he said, "Well, would you type them out". So, I typed them out just on plain paper for him. I never even kept a copy of it.

Q Is that an unusual procedure?

[39] A That is unusual, yes.

* * * *

[42] Q Would you look at the bottom of page 1, the last paragraph on page 1 of that letter?

Now, it states, "Pursuant to Rule 21 Mr. Foust is making this written report of his grievance claim and hereby requesting the International Brotherhood of Elec-

trical Workers to do everything within their power to enable Mr. Foust to be re-enstated as an employee without any loss of wages or loss of seniority."

Now, have you read that?

A I have read that.

Q And you agree that that's in Plaintiff's Exhibit No. 9.

A I see that Mr. Edward P. Moriarity wrote this letter and not Mr. Foust.

Q And that is on behalf of Mr. Foust?

A He didn't notify us of that fact.

Q I see; and so your position was that this was not a claim or a request in writing?

A No, it was not. In my position it was not.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C 74-50B

—
LEROY FOUST,

Plaintiff,

—vs—

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;
D. F. JONES, District Chairman in his representative
capacity; LEO WISINSKI, General Chairman in his
representative capacity; and FRANK T. GLADNEY, In-
ternational Vice President in his representative capacity,
Defendants.

—
JUDGMENT ON JURY VERDICT

The above-entitled cause having come on for trial to the
Court and a jury of six, and the issues having been duly
tried, and the jury having rendered its verdict, NOW,
THEREFORE, IT IS

ORDERED AND ADJUDGED that the plaintiff Leroy
Foust recover of and from the defendants the sum of
\$115,000.00, such amount constituting the jury award of
\$40,000.00 actual or compensatory damages and \$75,000.00
punitive or exemplary damages; it is

FURTHER ORDERED that the plaintiff have his costs
of action expended herein, to be taxed by the Clerk.

Dated this 17th day of May, 1976.

/s/ [Illegible]
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C 74-50

—
LEROY FOUST,

Plaintiff,

—vs—

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;
D. F. JONES, District Chairman in his representative
capacity; LEO WISINSKI, General Chairman in his
representative capacity; and FRANK T. GLADNEY, In-
ternational Vice President in his representative capacity,
Defendants.

—
MOTION FOR JUDGMENT NOTWITHSTANDING THE
VERDICT AND ALTERNATIVE MOTION
FOR NEW TRIAL

COME NOW the Defendants, having moved for a
directed verdict at every stage of the proceedings, which
motions were denied, and based upon those grounds urged
by Defendants on their Motions for Directed Verdict here-
by move the Court to enter Judgment Notwithstanding
The Verdict, pursuant to Rule 50(b) of the Federal Rules
of Civil Procedure.

In the alternative, if the foregoing Motion is not
granted, the Defendants, pursuant to Rule 59(a) of the
Federal Rules of Civil Procedure, move that the verdict
of the jury in the above-entitled cause be set aside and
that the Judgment entered on the verdict be vacated and
set aside and that a new trial be granted to Defendants
for the following reasons:

1. The verdict is contrary to the law and the evidence.
2. The verdict pertaining to actual or compensatory damages is excessive and appears to have been given under the influence of passion and prejudice.
3. The verdict pertaining to actual or compensatory damages is based upon improper elements of damages which are too remote and speculative.
4. The verdict pertaining to punitive or exemplary damages is excessive, remote, speculative and based upon improper elements of damages. The evidence, as reflected in the record, and the applicable law did not warrant an award for exemplary or punitive damages and the Court erred in not so instructing the jury.
5. The evidence, as reflected in the record, was totally insufficient to sustain a verdict of liability upon the part of any of the Defendants herein.

WHEREFORE, Defendants pray:

- (a) That the within Motions be set down for hearing by the Court;
- (b) That the Court grant Defendants' Motion For Judgment Notwithstanding The Verdict.
- (c) In the alternative, if the foregoing Motion is not granted, that the Court set aside the Judgment entered on the verdict and grant a new trial.
- (d) In the alternative, if the foregoing Motions are not granted, that the Court set aside the Judgment entered on the verdict and grant a new trial solely on the issue of damages.
- (e) In the alternative to granting a new trial, that the Court make and issue an alternative order grant-

ing a new trial unless a Remittitur is filed by the Plaintiff.

DATED this 25th day of May, 1976.

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LATHROP, UCHNER & MULLIKIN
A Professional Corporation

By /s/ David D. Uchner
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Attorneys for Defendants

CERTIFICATE OF SERVICE

A copy of the foregoing MOTION FOR JUDGEMENT NOTWITHSTANDING THE VERDICT AND ALTERNATIVE MOTION FOR NEW TRIAL was mailed, postage prepaid, addressed to Urbigkit, Halle, Mackey and Whitehead, Box 247, Cheyenne, Wyoming 82001, Attorneys for Plaintiff, on May 25th, 1976.

/s/ David D. Uchner
DAVID D. UCHNER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C 74-50

LEROY FOUST,
—vs— *Plaintiff,*

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;
D. F. JONES, District Chairman in his representative capacity; LEO WISINSKI, General Chairman in his representative capacity; and FRANK T. GLADNEY, International Vice President in his representative capacity,
Defendants.

**ORDER DENYING DEFENDANTS' MOTIONS FOR
JUDGMENT NOTWITHSTANDING THE VERDICT OR
IN THE ALTERNATIVE FOR A NEW TRIAL**

The above-entitled matter having come on regularly before the Court upon the motions of the defendant for judgment notwithstanding the verdict or in the alternative for a new trial, the Court having heard the arguments of counsel in support thereof and in opposition thereto on July 14, 1976, having considered the brief of defendants and the authorities relied upon by plaintiff, having taken the matter under advisement, and being now fully advised in all the premises, it is therefore

ORDERED that the motions of the defendants for judgment notwithstanding the verdict or in the alternative for a new trial be, and the same hereby are, denied.

Dated this 23d day of July, 1976.

/s/ Clarence A. Brimmer
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

No. C 74-50-B

LEROY FOUST,
—vs— *Plaintiff,*

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS:
D. F. JONES, District Chairman in his representative capacity; LEO WISNISKI, General Chairman in his representative capacity; and FRANK T. GLADNEY, International Vice President in his representative capacity,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that the International Brotherhood of Electrical Workers: D. F. Jones, District Chairman in his representative capacity; Leo Wisniski, General Chairman in his representative capacity; and Frank T. Gladney, International Vice President in his representative capacity, above named defendants, hereby appeal to the United States Court of Appeals for the Tenth Cir-

cuit from the final judgment entered in this action on the 17th day of May, 1976.

/s/ William J. Hickey
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Date August 18, 1976

U.S. COURT OF APPEALS
 TENTH CIRCUIT

MAY TERM—May 24, 1978

No. 76-1951

LERoy FOUST,
Plaintiff-Appellee,
 vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;
 D. F. JONES, District Chairman in his representative capacity; LEO WISNISKI, General Chairman in his representative capacity; and FRANK T. GLADNEY, International Vice President in his representative capacity,
Defendants-Appellants.

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay and Honorable James K. Logan, Circuit Judges

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by appellants in the captioned cause.

Upon consideration whereof, it is ordered:

1. The petition for rehearing is denied by Circuit Judges Holloway, Barrett and Doyle, who rendered the decision sought to be reheard.
2. No judge in regular active service or a judge who was a member of the panel that rendered the decision having requested a vote on the suggestion made by ap-

pellants, Rule 35, Federal Rules of Appellate Procedure,
the suggestion for rehearing en banc is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

SUPREME COURT OF THE UNITED STATES

No. 78-38

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
et al.,
Petitioners
v.

LEROY FOUST

ORDER ALLOWING CERTIORARI

Filed October 10, 1978

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted, limited to Question 3 presented by the petition.

Supreme Court, U. S.
FILED

AUG 2 1978

MICHAEL RODAK, JR., CLERK

NO. 78-38

In the
Supreme Court of the United States

OCTOBER TERM, 1977

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, ET AL.,**

Petitioners.

vs.

LEROY FOUST,

Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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In the
Supreme Court of the United States

OCTOBER TERM, 1977

NO. 78-38

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET AL.,

Petitioners,

vs.

LEROY FOUST,

Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

The Respondent, Leroy Foust, respectfully submits that no basis exists for this Court to exercise its discretion, pursuant to Rule 19, Rules of the United States Supreme Court for the granting of a Petition for a Writ of Certiorari.

INTRODUCTION

Respondent accepts Petitioners' Statement of Jurisdiction, questions presented, and Statement of the Case with only minor exceptions to the Statement of the Case.

In its Petition at page 5, Petitioner alleges that punitive damages were for "breach of contract" by the Brotherhood. A brief review of the case indicates that such an allegation is simply not supported. In its instruction to the jury on the issue of punitive damages, the Trial Court gave the following instruction to the jury:

"In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrong doer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If the jury should find from a preponderance of the evidence in the case that the Plaintiff is entitled to a verdict for actual or compensatory damages; and should further find that the act or omission of the Defendants, which proximately caused actual injury or damage to the Plaintiff, was maliciously, or wantonly, or oppressively done; then the jury may, if in the exercise of discretion they unanimously choose so to do, add to the award of actual damages such amount as the jury shall unanimously agree to be proper, as punitive and exemplary damages....

Whether or not to make any award of punitive and exemplary damages, in addition to actual damages, is a matter exclusively within the province of the jury, if the jury should unanimously find, from a preponderance of the evidence in the case, that the Defendants' act or omission, which proximately caused actual damage to the Plaintiff, was maliciously or wantonly or oppressively done; but the jury should always bear in mind that such extraordinary damages may be allowed only if the jury should first unanimously award the Plaintiff a verdict for actual or compensatory damages; and the jury should also bear in mind not only the conditions under which, and the purpose for which, the

law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any part to the case."

REASONS FOR DENYING WRIT

Petitioner has set forth three areas in which it alleges this Court ought to exercise its discretion in granting Petitioners' Petition for Writ of Certiorari. Respondent will deal with each of them as they appear in Petitioner's Petition by corresponding Roman Numeral.

I.

THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT ESTABLISHING THE STANDARDS TO BE USED IN DETERMINING WHETHER A COLLECTIVE BARGAINING REPRESENTATIVE HAS BREACHED ITS DUTY OF FAIR REPRESENTATION OWED TO A MEMBER OF THE BARGAINING UNIT

The Trial Court's instruction, affirmed by the Court of Appeals, was almost a direct quote from *Vaca v. Sipes*, 386 U.S. 171. Petitioner suggests that a different standard than that enunciated in *Vaca v. Sipes* should have been imposed, and refers this Court to *Amalgamated Association of Motor Coach Employees v. Lockridge*, 403 U.S. 274 as an example of that different standard. A studied examination of *Lockridge* indicates that the duty of the union to represent its members was not at issue in the case. Indeed, the Court stated that it was unnecessary to determine whether or not a breach of the duty of fair representation occurred in *Lockridge*, 403 U.S. 299, 300. This Court determined that the Idaho Supreme Court had correctly stated, as had the Trial Court, that this case involved one of the Union's duty under a contract.

Each of the other cases, including *Humphrey v. Moore*, 375 U.S. 335 and *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 are totally consistent with the standard set forth by this Court in *Vaca v. Sipes*.

Since the Trial Court's instruction to the jury was virtually a quote from *Vaca* (See Petition, p. 7a-9a) and since the Court of Appeals explained its holding in relation to the dicta of *Amalgamated Association of Motor Coach Employees v. Lockridge*, Supra, and viewed the decision of this Court in *Vaca v. Sipes*, Supra, in light of the Court's statements in *Hines v. Anchor Motor Freight, Inc.*, Supra, the claim of inconsistency in the opinion of the Court of Appeals with the decisions of this Court simply cannot stand. The decision of the Tenth Circuit Court of Appeals is entirely consistent with the holdings of this Court in relation to the duty of fair representation owed to a member of a bargaining unit by the recognized collective bargaining agent and there is no basis for the exercise of this Court's discretion in granting of a Petition for Writ of Certiorari in the instant case.

II.

THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT ESTABLISHING THE STANDARDS IN PROCEDURES TO BE USED IN THE OCCASION OF DAMAGES IN A FAIR REPRESENTATION CASE INVOLVING AN ALLEGED WRONGFUL DISCHARGE

The decision of this Court in *Farmer v. United Brotherhood of Carpenters and Joiners of America Local 25*, 430 U.S. 290, lays to rest any claim of inconsistency between the decision of the Court of Appeals, and the decisions of this Court in relation to the issue of damages raised in Petitioner's Petition. *Conley v. Gibson*, 355 U.S. 41, *Vaca v. Sipes*, Supra, *Czosek v. O'Mara*, 397 U.S. 25.

The decisions of the Courts of Appeals which are almost parenthetically claimed to be inconsistent with the decision of

the Court below support the identical result as was reached by both Courts below. *Balowski v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW), AFL-CIO*, 372 F.2d 829 (6th Cir. 1967), *Ruzicka v. General Motors Co.*, 523 F.2d 306 (6th Cir. 1975); *Thompson v. Brotherhood of Sleeping Car Porters*, 367 F.2d 489 (4th Cir. 1966), *Cert. Den.* 386 U.S. 960.

Clearly, the decision below, in light of the applicable decisions of this Court, is not in conflict with the decisions of this Court in relation to the allocation of damages in a fair representation case.

III.

THE DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT ON THE ASSESSABILITY OF EXEMPLARY DAMAGES AGAINST A BARGAINING REPRESENTATIVE IN FAIR REPRESENTATION CASES

This Court decided in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 that it was up to the Federal Trial Courts to fashion remedies which deal with the problems raised in these types of so-called labor relations cases. A broad range of discretion was left to the Trial Courts in fashioning such remedies, and that policy has been carried forward in the decisions of this Court relating to the duty of fair representation cases referred to in Petitioners' Petition. Indeed, the issue was laid to rest in *Farmer v. United Brotherhood of Carpenters and Joiners of America Local 25*, Supra, and the decision of the Court below, although not relying on *Farmer* was entirely consistent with the holding of this Court in relation to the issue of punitive damages.

There is no conflict between the decision of the Court below and the opinions of the Fourth Circuit in *Harrison v. United Transportation Union*, 530 F.2d 558 (4th Cir. 1975), *Cert. Den.* 425 U.S. 958 (1976) or *Emmanuel v. Omaha*

Carpenters District Council, 560 F.2d 382 (8th Cir. 1977). See also *Butler v. Local Union 823, International Brotherhood of Teamsters*, 514 F.2d 442 (8th Cir. 1975).

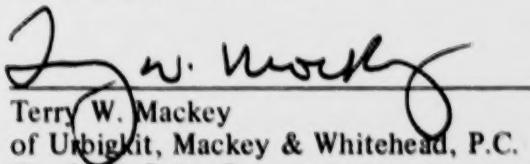
CONCLUSION

There is simply no basis for this Court to exercise its discretion under Rule 19 of the Rules of the United States Supreme Court, and grant Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

The Tenth Circuit Court of Appeals opinion is entirely consistent with the decisions of other Circuit Courts, and shows a great deal of insight in sorting the wheat from the chaff to reach a consistent position with the decisions of this Court in applying the law to the facts.

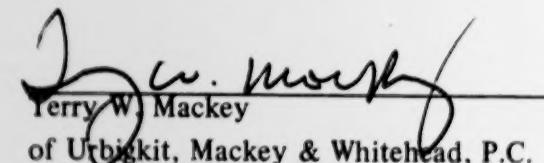
Petitioner admits in his Petition that the instructions to the jury given by the Trial Court were a correct statement of the law. Petitioner only has quarrel with the application of that law to the facts as presented to the jury. Thus, having failed to persuade the Trial Court and having failed to persuade the Court of Appeals, Petitioner attempts to paint a picture of conflict with a broad brush. No such conflict exists, either with the decision of this Court or with the decisions of the various Courts of Appeal, and Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit should be denied.

Respectfully submitted,


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CERTIFICATE OF SERVICE

Terry W. Mackey, of Urbigkit, Mackey & Whitehead, P.C. hereby certifies that on the 31 day of July, 1978, he served a true and correct copy of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit by mailing a copy thereof to William J. Hickey and Edward J. Hickey, Jr., of Mulholland, Hickey, Lyman, McCormick, Fisher & Hickey, 1125 Fifteenth Street, N.W., Suite 400, Washington, D.C. 20005 and depositing same in the United States Post Office at Cheyenne, Wyoming, postage prepaid.


 Terry W. Mackey
 of Urbigkit, Mackey & Whitehead, P.C.

DEC 4 1978

MICHAEL KUDAK, JR., CLERK

IN THE
Supreme Court of the United States
 OCTOBER TERM, 1978

No. 78-38

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
 WORKERS, ET AL.,

vs. *Petitioners,*

LERoy FOUST,

Respondent.

On Writ of Certiorari to the United States
 Court of Appeals for the Tenth Circuit

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-38

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, ET AL.,
Petitioners,
vs.

LEROY FOUST,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 572 F.2d 710, appears in the Appendix to the Petition for a Writ of Certiorari ("Pet.") at pp. 1a-19a. The District Court wrote a brief unreported opinion denying a motion to dismiss or for summary judgment, which is reproduced at A. 12.¹

¹ "A." refers to the Appendix in this Court.

JURISDICTION

The decision of the Court of Appeals was entered on March 6, 1978; a timely petition for rehearing was denied May 24, 1978. The petition for a writ of certiorari was granted on October 10, 1978. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

This is an action for breach of the duty of fair representation under the Railway Labor Act. The proceedings below and the partial denial of certiorari have established for the purpose of this case that the union breached its duty, although there was no evidence of malice or discriminatory intent or bad faith, and that compensatory damages of \$40,000 were properly assessed against the union for this breach. The question presented is whether the trial court erred in instructing the jury that it may award punitive damages and in refusing to set aside the verdict insofar as it awarded such damages.

STATUTE INVOLVED

This case involves the Railway Labor Act, 44 Stat. 577 (1926), as amended by 48 Stat. 1185 (1934), etc., 45 U.S.C. §§ 151-188 (sometimes hereafter "the RLA"). Particularly pertinent are certain provisions of § 2 of the RLA, which are reproduced in an Appendix hereto, pp. 1a-7a, *infra*.

STATEMENT OF THE CASE

1. As the Court of Appeals noted, this case grows out of

a jury verdict holding the [International Brotherhood of Electrical Workers] liable for breach of duty to fairly represent plaintiff-appellee Leroy Foust in grievance proceedings addressed to the Union Pacific Railroad and ultimately to the Railway Adjustment Board. The judgment of the district court was in favor of Foust and included an award of \$40,000

actual damages and \$75,000 punitive damages. [Pet. 1a.]

Following the well settled rule that the evidence in an appeal from a jury verdict is to be viewed most favorably to the prevailing party, that court then summarized the facts as follows:

Foust was a radioman, who had been employed by Union Pacific Railroad and had been a member of the International Brotherhood of Electrical Workers, which organization was his collective bargaining representative while he was employed by the railroad. The individual defendants herein are the officers of the Union. The injury to Foust occurred on March 9, 1970, while he was on the job. He had a claim against the railroad under the Federal Employer's Liability Act, which claim was settled on September 25, 1973. The settlement provided for payment of \$75,000 to Foust less \$2,600 in sickness benefits.^[2] He waived future right of employment and any claim that he might have had for alleged wrongful discharge against the railroad.

His second claim [against the Union Pacific] was that which had arisen as a result of the railroad company terminating his employment. A release was given with respect to this when he received the \$75,000 settlement.

The claim in the instant case is against the Union and is based on its alleged failure to represent him fairly in the proceedings having to do with his grievance which grew out of the termination of his employment by the Union Pacific Railroad Company.

* * * *

After his injury on March 9, 1970, Foust went on leave of absence from his job in order to obtain medical treatment for his injured back.

² Beginning on May 2, 1971 and continuing at least to the date of trial (May 1976), Foust received a monthly disability annuity. As of 1976 the amount was \$351.95 a month. In applying for the annuity, Foust "stated that [he was] physically disabled from performing the work of his job." (A. 55-56.)

The rules in the Collective Bargaining Agreement provided for an employee to file a request for a leave of absence for a limited period of time with rights of renewal on request. Based upon Rule 23(b) of the Collective Bargaining Agreement, he must apply for leave of absence at the peril of being terminated. The Agreement provides:

Failure to report for duty at the expiration of leave of absence shall terminate an employee's service and seniority, unless he presents a reasonable excuse for such failure not later than seven days after expiration of leave of absence.

On January 12, 1971, Union Pacific advised Foust by letter that his current leave of absence had expired December 22, 1970; that they had not heard from him; and that it was necessary that a proper request for an extension accompanied by a statement from his doctor be furnished. On January 21, 1971, Foust's then attorney informed the railroad that Foust had filed a request for extension in December and asked whether it had been received and, if not, what forms were needed.

The railroad responded on January 25, 1971, advising the attorney that it still did not have a physician's statement and that when one was received Foust's request for leave would be considered. However, on February 3, the railroad wrote to Foust and advised him that he was being terminated for failure to request an extension prior to expiration of his leave and for failure to furnish a statement from his doctor as to the necessity for additional leave.

Foust's attorney [Edward P. Moriarity] contacted the railroad in an attempt to get the decision to discharge Foust reversed. On March 26, 51 days after the date of discharge, [Moriarity] wrote to one Dean Jones, District Chairman of the Brotherhood. This letter was received Saturday, March 27. Thereupon, Jones contacted the General Chairman of the Systems Council in Omaha, Leo Wisniski. Wisniski prepared a letter which was sent first to Jones in

Omaha, and then sent to Foust with Jones' signature. This was dated April 5. It acknowledged receipt of the letter from Foust's lawyer. It explained that Rule 21 of the Collective Bargaining Agreement required a grievance to be presented in writing by or on behalf of the employee involved. The necessity to receive a written authority to handle claims or grievances on behalf of an employee was explained. The letter went on to say that: "... Upon receipt of your grievance in writing, and request to the undersigned to handle your initial claim pertaining to the Carrier terminating your service, it will be reviewed and handled under the proper grievance procedures . . ."

Jones filed a claim on Foust's behalf, but did not do so before April 6, which was two days after the deadline. The claim letter was prepared by Wisniski in Omaha and was mailed to Jones in Rawlings, Wyoming, and then sent by Jones to the railroad officer in Omaha. * * * [T]his claim was denied because of its not having been timely filed.^[a] The Union appealed this decision, but it was finally denied by the Railway Board of Adjustments as having been filed two days late. [Pet. 2a-6a, footnote omitted.]

2. There are certain additional undisputed facts that place the foregoing summary in context.

First, in 1971, Jones was both a Union Pacific equipment man, working full time at that job which required substantial travel, and the IBEW District Chairman for the Union Pacific's Eastern District. (A. 39.) Jones "operate[d] out of [his] house for no compensation". (Jones Deposition, p. 56).^[4] This Union position, which he

^[a] The elided portion of the opinion below reads, "It is not surprising that * * *". That phrase is omitted because we accept the lower court's summary of the facts, but not its characterization of their import.

^[4] The portions of the Jones Deposition and the letters from Jones to Foust cited in this and the next paragraph were not included in the Appendix. For the Court's convenience, they are reproduced respectively as Appendix B and Appendix C to this Brief.

had held since 1968, entailed the "filing and handling of claims and grievances of men in [his] craft." (Jones Deposition, p. 9.) At the time in question, Wisniski was the IBEW General Chairman for the Union Pacific. He had held that paid full time position since 1962. Prior to that, he had been a railroad electrician. (A. 85.) Wisniski "handle[d] all and settle[d] all claims and grievances after they have been handled on the local level." (A. 85.)

Second, Foust's case was out of the ordinary in two respects. It was presented to Jones by a third person rather than the grievant and grew out of a job related injury. (Jones Deposition, p. 69.) It was Wisniski's and Jones' understanding: that "Rule 21 [of the collective agreement] provides that all claims or grievances must be presented in writing by or on behalf of the employee involved, that is why it is necessary to receive in writing authority to handle claims or grievances for further handling," (letter from Jones to Foust dated April 5, 1971);⁵ and that injury related claims do not arise and are not handled under the contract but rather under the applicable federal laws: "there are no provisions by agreement for filing claims due to medical reasons or injuries under the terms of the present agreement when employees are withheld from service by Doctors orders" (Letter from Jones to Foust dated April 9, 1971).⁶

Third, Foust testified:

⁵ The requirement that a union processing a railroad employee's grievance must secure the employee's authorization to do so is spelled out in *Elgin J.&E. R. Co. v. Burley*, 325 U.S. 711, adhered to on rehearing, 327 U.S. 661, which is discussed at pp. 50-51, *infra*.

⁶ See the Federal Employer's Liability Act, 45 U.S.C. §§ 51, *et seq.*; the Railroad Retirement Act, 45 U.S.C. §§ 228a *et seq.* and the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351, *et seq.*, which respectively provide railroad employees injured on the job a federal cause of action in tort, a disability annuity and sickness benefits.

Q. [By Mr. Hickey] During the period February 5, 1971, Mr. Foust, to April 5, 6, 7, 1971, did you ever personally communicate with Mr. Jones? Personally communicate, did you, during that period?

A. What was your first date?

Q. February 5, 1971, the date you received your discharge letter.

A. No.

Q. You did not?

A. No.

Q. Did you ever communicate with Mr. Wisniski?

A. No.

Q. Did you ever communicate with any representative of the Union?

A. No. I had my attorneys do this.

Q. You had your attorneys do that?

A. Yes. [A. 42.]

And, as the Court of Appeals' noted between February 5, 1971 and April 5, 1971 the sole communication to the Union by Foust's attorneys was the certified letter to Jones dated Friday, March 26, 1971 signed for by Jones' daughter on Saturday, March 27 (eight days before the end of the 60-day period for filing Foust's grievance).

Fourth, Foust also testified:

Q. [By Mr. Hickey] Do you know of any reason why they [Wisniski or Jones] would want to do you harm for any reason whatsoever?

A. No, I can't truthfully say that there was.

* * * *

Q. [By Mr. Hickey] Do you know what the Union did that you had a basis to complain about or did not do?

A. That the Union?

Q. Yes.

A. They didn't represent me properly.

Q. Can you explain that for us in how you feel they did not represent you properly?

A. Well, in this one ruling here they ruled two days after the sixtieth day limit so the Union was two days late.

Q. All right, sir. Now so they filed your claim two days late. Anything else?

A. Well, due to that I was terminated so that just about covers everything. [A. 44.]

3. Over the Union's objection (A. 68-69) the case was sent to the jury with an instruction permitting the award of punitive damages. (A. 65-67.) The jury did make such an award in the amount of \$75,000 (A. 69, 90), the sum the plaintiff requested (A. 9-10, 59); the District Court denied the Union's motion for a judgment notwithstanding the verdict or for a new trial (A. 94); on appeal the Tenth Circuit "approve[d] * * * the submission by the court of the issue of exemplary damages to the jury and [found] no fault in the trial court's instruction" (Pet. 18a).⁷ This case is before this Court pursuant to a grant of certiorari limited to the punitive damage question.

INTRODUCTION AND SUMMARY OF ARGUMENT

When, in *Steele v. Louisville & N. R. Co.*, 323 U.S. 192, this Court declared the existence of the bargaining agent's duty of fair representation under the Railway Labor Act, it stated that "the statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty." (*Id.*

⁷ While recognizing that "[a]bout the only tangible evidence in the record is for lost wages, which would be based on [Foust] continuing to have his old job", the Court of Appeals also affirmed the compensatory damages award, stating that the trial "court first told the jury that it was 'to ignore any evidence relating to whether or not the plaintiff was wrongfully discharged from employment by the Union Pacific Railroad Company' * * *" and that the "union itself consented to the court's instruction that the wrongful discharge suit and the fair representation action were distinct and separate * * *." (Pet. 14a-16a.)

at 207.) ("The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making." (*Id.* at 203-204).)

The availability of punitive damages was not discussed, no such relief having been sought in the complaint which this Court reinstated. (See Record, #45 Oct. Term 1944, p. 10.) But the *Steele* Court did state how questions of remedy for breach of the duty of fair representation are to be decided:

[T]he right asserted, which is derived from the duty imposed by the statute on the bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct. "The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted. *Deitrick v. Greaney*, 309 U.S. 190, 200, 201; *Board of County Commissioners v. United States*, 308 U.S. 343; *Sola Electric Co. v. Jefferson Co.*, 317 U.S. 173, 176-7; cf. *Clearfield Trust Co. v. United States*, 318 U.S. 363. [323 U.S. at 204. Cf. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-457.]

We begin this task of extrapolation by surveying the cases arising under the National Labor Relations Act of 1935 (NLRA) and the Labor-Management Relations Act of 1947 (LMRA), which spell out the national labor policy on remedies. We do so because those precedents are far more complete and informative with regard to the question posed here than the language and structure of the RLA. The principle that emerges is that these Acts are "essentially remedial" and do not "confer a punitive

jurisdiction." (*Republic Steel Corp. v. Labor Board*, 311 U.S. 7, 10, 11. See also *Teamsters Union v. Morton*, 377 U.S. 252, 260-261 (§ 303 of the LMRA).) It also appears, as the Ninth Circuit has held (*Williams v. Pacific Maritime Association*, 421 F.2d 1287, 1289), that in *Vaca v. Sipes*, 386 U.S. 171, 195, an LMRA fair representation case, this Court has recognized that punitive damages are not available for a union's failure to properly process a grievance.

We then turn from the NLRA and LMRA materials to the RLA and show that the lesson we draw from the overall labor law is supported by, or at the least wholly consistent with, that statute's provision on remedies, § 2 Tenth.

We conclude Part I of our argument by a demonstration that the Court of Appeals' asserted justification for permitting punitive damages cannot survive scrutiny; and by a proposal derived from Judge Parker's opinion in *United Mine Workers v. Patton*, 211 F.2d 742 (C.A. 4) that, as a general matter, since Congress has repeatedly made express provision for damages in excess of those actually sustained by the plaintiff, the intent to allow such damages under a federal statute should be attributed to Congress only if such intent affirmatively appears in the statute's language or from its legislative history. We point out that the policy judgment as to whether punitive damages should be allowed is one peculiarly suited to legislative determination.

In Part II of the brief we show that "mere inadvertence or even gross negligence will not suffice to support an award of punitive damages." (*Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527, 549 (C.A.D.C.), citing Prosser, *Torts*, pp. 9-10 (4th ed. 1971). See also *Jones v. Mayer Co.*, 392 U.S. 409, 414-415, n.9; *Carey v. Piphus*, 435 U.S. 247, 257, n.11.) Viewing the evidence most favorably to the plaintiff, it cannot possibly support a punitive damage award under that standard.

ARGUMENT

I. PUNITIVE DAMAGES ARE NOT A PROPER REMEDY FOR BREACH OF THE DUTY OF FAIR REPRESENTATION UNDER THE RAILWAY LABOR ACT.

A. *The National Labor Policy.* (1). In embarking on the inquiry that follows we recognize that "**** all parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes." (*Chicago & N.W.R. Co. v. United Transp. Union*, 402 U.S. 570, 579, n.11.) But as that case illustrates (*id.* at 578-579), this Court has, where there are no pertinent "differences between the statutory schemes" (*id.*), repeatedly drawn such parallels between these two labor statutes.⁸ And, whatever similarities and differences may be found in other contexts, the duty of fair representation under the NLRA is parallel to the duty originally declared under the RLA, as the Court made clear in its first NLRA fair representation case, *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337:

The National Labor Relations Act, as passed in 1935 and as amended in 1947, exemplifies the faith of Congress in free collective bargaining between employers and their employees when conducted by freely and fairly chosen representatives of appropriate units of employees. That the authority of bargaining representatives, however, is not absolute

⁸ See also, e.g., *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 347: "The decision in *J. I. Case Co. v. National Labor Relations Board* decided today, 321 U.S. 332, considers more generally the relation of individual contracts to collective bargaining, and much that is said in that opinion is applicable here"; *Machinists v. Central Airlines*, 372 U.S. 682, 691: "[T]he [RLA] § 204 contract, like the Labor Management Relations Act § 301 contract is a federal contract and is therefore governed and enforceable by federal law, in the federal courts."

is recognized in *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198-199, in connection with comparable provisions of the Railway Labor Act. Their statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all of those members, without hostility to any. *Id.* at 198, 202-204; *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, 211; *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768.

The point that the NLRA law in this respect rests on the rule declared in *Steele* has since been reemphasized, most notably in *Vaca v. Sipes*, 386 U.S. 171, 177:

It is now well established that, as the exclusive bargaining representative of the employees in Owens' bargaining unit, the Union had a statutory duty fairly to represent all of those employees, both in its collective bargaining with Swift, see *Ford Motor Co. v. Huffman*, 345 U.S. 330; *Syres v. Oil Workers International Union*, 350 U.S. 892, and in its enforcement of the resulting collective bargaining agreement, see *Humphrey v. Moore*, 375 U.S. 335. The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, see *Steele v. Louisville & N.R. Co.*, 323 U.S. 192; *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, and was soon extended to unions certified under the N. L. R. A., see *Ford Motor Co. v. Huffman*, *supra*. [See also, *Vaca*, 386 U.S. at 182; *Hines v. Anchor Motor Freight*, 424 U.S. 554, 564.]

(2). In *Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005, cert. denied, 434 U.S. 837, the Third Circuit,

faced with the questions presented here, ruled that the RLA does not provide punitive damages for breaches of the duty of fair representation, relying in large part on the "numerous labor law decisions limiting relief only to redress of specific injuries and refusing to impose punitive sanctions" (*id.* at 1019). That court noted:

Punitive damages have been consistently rejected in unfair labor practice cases under the National Labor Relations Act, see *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940); *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961); *NLRB v. United States Steel Corp.*, 278 F.2d 896, 900-901 (3d Cir. 1960), cert. denied, 366 U.S. 908 (1961); in actions for recovery of tortious damages under § 303 of the Labor-Management Relations Act, 29 U.S.C. § 187, *Teamsters Local 20 v. Morton*, 377 U.S. 252, 260-261 (1964); and in actions arising under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, *United Shoe Workers v. Brooks Shoe Mfg. Co.*, 298 F.2d 277 (3d Cir. 1962) (per curiam en banc), in which Chief Judge Biggs, concurring, found that "it is the general policy of the federal labor laws, to which the federal courts are to look for guidance in Section 301 actions, to supply remedies rather than punishments." [552 F.2d at 1019.]

Because we submit that this policy is controlling on the present issue, we shall discuss in some detail the precedents cited in *Deboles* and others in accord.

The classic statement of the remedial, as opposed to punitive, character of the NLRA's policy is that of Chief

Justice Hughes in *Republic Steel Corp. v. Labor Board*, 311 U.S. 7, 10-12:

We think that the theory advanced by the Board proceeds upon a misconception of the National Labor Relations Act. The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. The Act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees. Had Congress been intent upon such a program, we cannot doubt that Congress would have expressed its intent and would itself have defined its retributive scheme.

The remedial purposes of the Act are quite clear. It is aimed, as the Act says (§ 1) at encouraging the practice and procedure of collective bargaining and at protecting the exercise by workers of full freedom of association, of self organization and of negotiating the terms and conditions of their employment or other mutual aid or protection through their freely chosen representatives.

* * * *

Th[e] language [of § 10(c)] should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that "this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." We have said that the power to command affirmative action is remedial.

not punitive. *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 235, 236. See, also, *National Labor Relations Board v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267, 268. We adhere to that construction.

In that view, it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end.⁹

The last of these observations is particularly pertinent because the proponents of punitive damages attach major, if not principal, importance to their assumed deterrent effect. See Point I D, *infra*. That this rationale is unacceptable under the NLRA was made clear by the present Chief Justice, writing on behalf of the District of Columbia Circuit in *Local 57, International Ladies' Garment Wkrs. U. v. NLRB*, 374 F.2d 295, cert. denied, 387 U.S. 942:

As final argument, the Board urges that the remedy is necessary to deter other employers from fleeing union relationships and thus to protect statutory rights of employees generally, although this rationale was not suggested prior to filing the Board brief here. It has been established, however, that the purpose of Board remedies is to rectify the harm done the injured workers, not to provide punitive meas-

⁹ So, too, in *Carpenters Local v. Labor Board*, 365 U.S. 651, 655, this Court disapproved a Board order which had required the union to return dues and fees paid by employees as a remedy for an unlawful closed shop agreement between the union and the employer. Because there was no basis for concluding that "the unlawful contract had caused or compelled the payment of the dues which the Labor Board had ordered refunded"; the reimbursement remedy went beyond removing the "consequence of the violation" (quoting *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 236) and was therefore impermissibly punitive rather than remedial.

ures against errant employers. “[T]he power to command affirmative action is remedial, not punitive.” *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12, 61 S.Ct. 77, 79, 85 L.Ed. 6 (1940). *Deterrence alone is not a proper basis for a remedy.* *Ibid.*; *NLRB v. Coats & Clark, Inc.*, 241 F.2d 556, 561 (5th Cir. 1957). The Board argues that the order is permitted by Section 10(a), which allows the Board “to prevent any person from engaging in any unfair labor practice.” But it seems quite clear that this means the Board may stop an actively continuing unfair labor practice that has been discovered and adjudicated, as distinguished from a general deterrence of unfair labor practices. [374 F.2d at 303-304, footnote omitted, emphasis added.]¹⁰

This Court has also held that Congress disapproved punitive damage awards in suits under § 303 of the LMRA, which provides that a person “injured in his business or property” by illegal secondary boycotting “shall recover the damages by him sustained.” In *Teamsters Union v. Morton*, 377 U.S. 252, the Court unanimously ruled, reversing a punitive damage award:

Punitive damages for violations of § 303 conflict with the congressional judgment, reflected both in the language of the federal statute and in its legis-

¹⁰ In *National Labor Relations Board v. Coats & Clark, Inc.*, 241 F.2d 556, 561 (C.A. 5), which was cited in *Local 57, supra*, Judge Tuttle wrote:

The Board thus adverts to two different, though not mutually exclusive aspects of a remedial order: the order may be designed to make someone whole who has been deprived of a recognized interest by acts that constitute a violation of the Act and/or the order may be designed to prevent the violator from benefitting by his misdeed. If neither of those aspects is present it is hard to see how an order may be considered “remedial” as distinct from merely punitive; every punishment made to “fit the crime” is not necessarily remedial, especially if its purpose is more to provide “a source of innocent merriment,” i.e. serve as an example, rather than to restore to someone a right he is entitled to or to deprive a malfeasor of an advantage unjustly seized.

lative history, that recovery for an employer’s business losses caused by a union’s peaceful secondary activities proscribed by § 303 should be limited to actual, compensatory damages. And insofar as punitive damages in this case were based on secondary activities which violated only state law, they cannot stand, because as we have held, substantive state law in this area must yield to federal limitations. In short, this is an area “of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law.” *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176. Accordingly, we hold that since state law has been displaced by § 303 in private damage actions based on peaceful union secondary activities, the District Court in this case was without authority to award punitive damages. [377 U.S. at 260-261, footnote omitted.]

Thus, *Morton* held both that punitive damages are unavailable for a violation of § 303, and that this provision embodies a federal policy which precludes such an award for violation of state law forbidding the same conduct.¹¹ The Court cited with approval (*id.* at 261, n.17) *United Mine Workers v. Patton*, 211 F.2d 742, 748-750 (C.A.4), which anticipated the *Morton* result; the *Patton* case is discussed at pp. 33-35, *infra*.

(3). *Republic Steel* and *Morton* state in the clearest terms a national labor policy of remedial and not punitive sanctions. Admittedly, both cases arose in a context at one remove from that here. There is, however, a decision of this Court—*Vaca, supra*—that in terms treats with the question of whether punitive damages are recoverable in

¹¹ Of course, any award for strike conduct not unlawful under § 303 was proscribed by the holding earlier in the *Morton* opinion that the States may not interfere with conduct which Congress left to the free play of economic forces. (See 377 U.S. at 259-260.)

duty of fair representation suits. Because we are uncertain as to the scope of its holding on this question we have postponed consideration of that precedent to this point. In Part IV of the *Vaca* opinion, the Court discussed what damages a plaintiff may recover against a union for breach of the duty of fair representation:

For the Union's role in "preventing Plaintiff from completely exhausting administrative remedies," Owens requested, and the jury awarded, compensatory damages for the above-described breach of contract plus punitive damages of \$3,000. R. at 4. We hold that such damages are not recoverable from the Union in the circumstances of this case. [386 U.S. at 195.]

The succeeding discussion dealt with the proper measure of compensatory damages, stating the principle that liability is to be apportioned "between the employer and the union according to the damage caused by the fault of each." (*Id.* at 197.) Pursuant to that principle "even if the union had breached its duty, all or almost all of Owens' damages would still [have been] attributable to his allegedly wrongful discharge by Swift." (*Id.* at 198).

The holding that punitive damages were not recoverable from the union, while not otherwise elaborated, may be explained on either of two possible grounds: (1) that punitive damages are not recoverable against a union that breaches its duty of fair representation in handling a grievance, or (2) that in such a case punitive damages may not be recovered from a party which is responsible for no or almost no compensatory damages.

In *Williams v. Pacific Maritime Association*, 421 F.2d 1287, 1289 (C.A. 9), the Court of Appeals read *Vaca*'s holding as resting on the first of these grounds:

Turning to the merits, we think the proposition is established under federal labor law that punitive

damages may not be awarded for grievances of the kind alleged in the fourth and fifth claim. See *Vaca v. Sipes*, 386 U.S. 171, 195, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). It is likewise our view that, under federal labor law, individual union members are not liable in damages by reason of conduct such as plaintiffs charge against the personal defendants. 29 U.S.C. § 185(b), *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 245, 82 S.Ct. 1318, 8 L.Ed.2d 462 (1962). [Footnote omitted.]

And, the Ninth Circuit's understanding that the *Vaca* Court took the unavailability of punitive damages as given is supported by several substantial considerations.

First, the Court stressed that the union's obligation as exclusive representative "fairly to represent all" the employees in the covered bargaining unit is a "statutory duty". (386 U.S. at 177.) As we have seen, it is well-settled that a central feature of the statute that gives rise to that duty is that only remedial sanctions are available.

Second, *Vaca* reaffirms the proposition established in *Humphrey v. Moore*, 375 U.S. 335, 343-344, that where a complaint "charg[ing] a breach of duty by the union in the process of settling *** grievances *** under the collective bargaining agreement" is filed,

[the] action is one arising under § 301 of the Labor Management Relations Act and is a case controlled by federal law, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, even though brought in the state court. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95; *Smith v. Evening News Assn.*, 371 U.S. 195. Although there are differing views on whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act, it is not necessary for us to resolve that difference here. Even if it is, or arguably may be, an unfair labor practice, the complaint here alleged that Moore's discharge would vio-

late the contract and was therefore within the cognizance of federal and state courts, *Smith v. Evening News Assn.*, *supra*, subject, of course, to the applicable federal law. [Footnotes omitted.]

And, as Mr. Justice White added in *Vaca*:

[W]e think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance. We may assume for present purposes that such a breach of duty by the union is an unfair labor practice, as the NLRB and the Fifth Circuit have held. The employee's suit against the employer, however, remains a § 301 suit, and the jurisdiction of the courts is no more destroyed by the fact that the employee, as part and parcel of his § 301 action, finds it necessary to prove an unfair labor practice by the union, than it is by the fact that the suit may involve an unfair labor practice by the employer himself. The court is free to determine whether the employee is barred by the actions of his union representative, and, if not, to proceed with the case. And if, to facilitate his case, the employee joins the union as a defendant, the situation is not substantially changed. The action is still a § 301 suit, and the jurisdiction of the courts is not pre-empted under the *Garmon* principle. This, at the very least, is the holding of *Humphrey v. Moore*, *supra*, with respect to pre-emption, as petitioners recognize in their brief. And, insofar as adjudication of the union's breach of duty is concerned, the result should be no different if the employee, as Owens did here, sues the employer and the union in separate actions. There would be very little to commend a rule which would permit the Missouri courts to adjudicate the Union's conduct in an action against Swift but not in an action against

the Union itself. [386 U.S. at 186-187, footnote omitted.]

The law concerning punitive damages in a § 301 action is the same as that stated in *Republic Steel and Morton*. The leading case is *Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co.*, 298 F.2d 277, where the Third Circuit, sitting *en banc*, held that punitive damages are not available in a suit under § 301 for breach of contract, even though the same conduct is also an unfair labor practice (the circumstance relied on by the Judges who dissented on this point). Chief Judge Biggs wrote in pertinent part:

* * * Section 303 of the Labor Management Relations Act, as amended, 29 U.S.C.A. § 187 (1960 Supp.), indicates that Section 301 of the Act, 29 U.S.C.A. § 185 (1956), does not contemplate the imposition of punitive awards. Congress in dealing with the tortious conduct prohibited by the Act clearly limited recovery to compensatory damages and costs. Note the language of Section 303(b) which provides that the injured employer "shall recover the damages by him sustained and the cost of the suit." See *United Mine Workers of America v. Patton*, 211 F.2d 742, 749-750, 47 A.L.R.2d 850 (4 Cir.), cert. denied, 348 U.S. 824, 75 S.Ct. 38, 99 L.Ed. 649 (1954). If my assumption be correct Congress should not be credited with the intention of authorizing punitive awards for causes of action arising under Section 301, the contract section, of the law. *It is the general policy of the federal labor laws, to which the federal courts are to look for guidance in Section 301 actions, to supply remedies rather than punishments.* This was indicated by the Supreme Court in *Republic Steel Corp. v. N.L.R.B.*, 311 U.S. 7, 10-13. [298 F.2d at 284, concurring opinion, emphasis added.]

See also *id.* at 285-286 (opinion of Kalodner, J., concurring on this point):

Judge STALEY recognizes that "As a general rule, punitive damages are not recoverable in an action for breach of contract," but makes an exception here because the breach of contract was in "disregard of a duty imposed by law independently of contract", to wit, Section 8 of the National Labor Relations Act.

On this score one needs go no further than to point out that in *Republic Steel Corp. v. N.L.R.B.*, 311 U.S. 7, 61 S.Ct. 77, 85 L.Ed. 6 (1940) where it was held that punitive damages cannot be imposed by the National Labor Relations Board in a Section 8 violation.

The basic thrust of both the substantive and damage allocation rules announced in *Vaca* is to assure that where "the employer has committed a wrongful discharge in breach of that agreement" and the union breaches its duty of fair representation in prosecuting a grievance, the injured employee is not "deprive[d] of all remedies for breach of contract", and employers are not shielded "from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements". (386 U.S. at 185-186; compare *id.* at 196-198.) It would, to say the least, be anomalous if a body of law designed to place an employee covered by a collective agreement in the place he would have occupied if the union had pressed his grievance properly were to provide that employee an opportunity to recover punitive damages even though he would only have been entitled to a compensatory remedy had the grievance run its course.

Third, the two considerations just noted are mutually reinforcing. Both the NLRA and § 301 provide only remedial, and not punitive, sanctions. The logic of the situation is that sanctions for a breach of the duty derived from these sources must also be remedial, and not punitive. It is beyond the generative capacity of such parents to produce an offspring so completely unlike themselves.

Of course, if the *Vaca* opinion states the broader of the two possible holdings just outlined, that authority would require reversal of the punitive damage award here, unless, contrary to our submission at pp. 11-13 and 24-25, a distinction were to be made between NLRA-LMRA fair representation cases and those under the RLA. If, however, the narrower reading is the correct one, then given the procedural posture of this case and the limited grant of certiorari, the propriety of that award would be a question of first impression in this Court.

(4). Before turning to the possible distinction between NLRA and RLA fair representation law, it is instructive, we believe, to discuss the line of demarcation between the precedents just reviewed and the line of authority from *United Workers v. Laburnum Corp.*, 347 U.S. 656, and *Automobile Workers v. Russell*, 356 U.S. 644, through *Farmer v. Carpenters*, 430 U.S. 290, permitting the award of punitive damages where the claim grows out of a labor dispute but is based on the state law of torts. The point of the *Laburnum-Russell* line is that in certain respects the federal law does not displace the state's remedial scheme. It is precisely because those cases are governed by state not federal law that punitive damages are recoverable and that the Court in *Russell* deemed irrelevant, and did not address, the thorough analysis in Chief Justice Warren's dissenting opinion of the reasons why national labor policy strongly disfavors punitive damages (356 U.S. at 650-659). The majority recognized that "[t]o the extent that such relief is penal in its nature, it is all the more clearly not granted to the Board by the Federal Acts." (*Id.* at 646, citing *Republic Steel*, *supra*.)

But even in those instances in which the states retain their authority to apply their own substantive laws to labor disputes, this Court has restricted the states' freedom to award punitive damages. In *Linn v. Plant Guard Workers*, 383 U.S. 53, 66, the Court held that in state law

defamation suits arising out of labor disputes—which *Linn* permitted to go forward—“the defamed party must establish that he has suffered some sort of compensable harm as a prerequisite to the recovery of additional punitive damages.” As a further constraint it declared that “[i]f the amount of damages awarded is excessive, it is the duty of the trial judge to require a remittitur or a new trial.” (*Id.* at 65-66.) The Court has deemed it necessary to reiterate that admonition. *Letter Carriers v. Austin*, 418 U.S. 264, 287, n. 17 (defamation); *Farmer v. Carpenters Union*, 430 U.S. 290, 306 (intentional infliction of mental suffering).¹²

B. The Language of the RLA. The Third Circuit in *Deboles* concluded:

There is no indication that the Railway Labor Act deviates from this general pattern of remedies [under the NLRA] at least with respect to union misconduct. Reballoting is the statutory remedy for instances where a vote has been impaired by misconduct of the carrier. Section 2 (Ninth) of the Railway Labor Act, 42 U.S.C. § 152 (Ninth). Criminal sanctions are imposed by Section 2 (Tenth) of the Act upon carriers (and not unions) but only with respect to willful failure or refusal of a carrier to comply with the certain of the Act’s duties, such as the duty to refrain from interference with the organization chosen by the employees. 42 U.S.C. § 152 (Tenth). [552 F.2d at 1019.]

¹² In *Letter Carriers*, a defamation action arising out of a labor dispute among employees of the post office whose labor relations were then governed by a federal executive order, the jury awarded to each of three plaintiffs \$10,000 in compensatory damages and \$45,000 in punitive damages. (See 418 U.S. at 269.) In *Farmer*, the jury had awarded the plaintiff \$7,500 in compensatory damages and \$175,000 in punitive damages. (See 430 U.S. at 294.) In both cases these verdicts were left undisturbed by the trial court.

As *Deboles* indicates, the materials on the RLA’s remedies are sketchy. That Act does not expressly provide for civil remedies for violation of its duties—even those which it expressly declares. This Court, however, early held that the Railway Labor Act of 1926, “impose[d] certain definite obligations enforceable by judicial proceedings” (*Texas & N.O.R. Co. v. Brotherhood Ry. & S.S. Clerks*, 281 U.S. 548, 567), and that holding has repeatedly been reaffirmed (see, e.g., *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 545; *Chicago & N.W.R. Co., supra*, 402 U.S. at 578-581). But these cases do not address the availability of punitive damages in such “judicial proceedings.”

Section 2 Tenth, to which the *Deboles* Court referred, provides in full:

The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than \$1,000, nor more than \$20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier’s employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: Provided, That nothing in this chapter shall be construed

to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Excluded from § 2, Tenth, are those statutory duties which are most closely related to the judicially implied duty of fair representation—those declared in §§ 2, First and Second. As this Court said in *Steele*, (323 U.S. at 200):

Section 2, Second, requiring carriers to bargain with the representative so chosen, operates to exclude any other from representing a craft. *Virginian R. Co. v. System Federation*, *supra*, 545. The minority members of a craft are thus deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, and see under the like provisions of the National Labor Relations Act *J. I. Case Co. v. Labor Board*, 321 U.S. 332, and *Medo Photo Supply Corp. v. Labor Board*, 321 U.S. 678.

Moreover, the duty of fair representation attaches to the unions' performance of the obligations declared in § 2, First,

to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Thus, this Court said in *Graham v. Brotherhood of F.L. & E.*, 338 U.S. 232, 239:

The right [to be fairly represented] is analogous to the statutory right of employees to require the employer to bargain with the statutory representative of a craft, a right which this Court has enforced and protected by its injunction in *Texas & New Orleans R. Co. v. Brotherhood of Clerks*, *supra*, 556-557, 560, and in *Virginian R. Co. v. System Federation*, *supra*, 548, and like it is one for which there is no available administrative remedy." *Steele v. Louisville & Nashville R. Co.*, *supra*, 207. And see *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, *supra*, 213.

As § 2, First, makes clear by its terms, such bargaining includes both making agreements and settling disputes arising out of their application. (See *e.g.*, *Elgin, J. & E. R. Co. v. Burley*, *supra*, 325 U.S. at 721, n. 18, on rehearing, 327 U.S. at 665, n. 6.) The relationship between the bargaining obligations declared in § 2, First, and the duty of fair representation is lucidly explained in *Conley v. Gibson*, 355 U.S. 41, 46:

The bargaining representative's duty not to draw "irrelevant and invidious" distinctions among those it represents does not come to an abrupt end, as the respondents seem to contend, with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement. A contract may be fair and impartial on its face yet administered in such a way, with

the active or tacit consent of the union, as to be flagrantly discriminatory against some members of the bargaining unit. [Footnote omitted.]

The short of the matter is this. A carrier could not be punished under § 2 Tenth, for failure to bargain in good faith for a collective agreement, or for failure to observe an obligation spelled out in such an agreement. The fair inference is that if Congress had spelled out the duty of fair representation, it would not have subjected that duty to the sanction of § 2 Tenth. And, it follows that a union may not be subjected to punitive damages for breaching that duty. Congress has deviated from its general labor policy against punitive remedies only by subjecting a carefully confined category of *carrier* violations to the criminal law, which provides both penalties and substantial procedural safeguards not included in the civil law; those penalties insofar as they include fines are controlled by the \$20,000 limit per violation. Since the legislature has gone that far but no further, it would be improper to permit punitive damages in civil suits against unions for a breach of an obligation outside the scope of § 2, Tenth.

C. The Opinion Below. In sustaining the award of punitive damages the court below discussed neither the national labor policy nor the RLA's language and structure. That court dismissed *Vaca* without stating what it believed to be the basis for this Court's rejection of punitive damages in that case. And, the Court of Appeals put aside the analysis of the issue in *Deboles* as "[d]icta", a characterization which is incorrect,¹³ and

¹³ As the Third Circuit explained, in the absence of injury proximately caused by the misrepresentation which constituted the breach of the union's duty, "any remedy against the union would necessarily be a 'punishment' for a harmless lie" (552 F.2d at 1019). On that entirely sound premise the plaintiffs could obtain damages against the union without proving that they had suffered any injury proximately caused by the violation only if punitive damages are recoverable under the RLA.

which in any event cannot justify total disregard of the Third Circuit's reasoning. Nor did the lower court even mention three decisions, cited in the appellants' brief, in which punitive damages were held to be unavailable in a suit for breach of the duty of fair representation: *Williams v. Pacific Maritime Assoc.*, 421 F.2d 1287, 1289 (C.A. 9)¹⁴; *Brady v. Trans World Airlines, Inc.*, 196 F.Supp. 504, 506-507 (D. Del.), affirmed without reaching this issue, 401 F.2d 87, 105 (C.A. 3), cert. denied, 393 U.S. 1048¹⁵; and an earlier case in the U.S. District Court for the District of Wyoming, *Crawford v. Pittsburgh-Des Moines Steel Co.*, 386 F.Supp. 290.¹⁶ One of

¹⁴ Quoted at pp. 18-19, *supra*.

¹⁵ Chief Judge Caleb M. Wright wrote:

Plaintiff's second statutory basis for this action is the duty of a union to bargain fairly on behalf of those it represents and not to act with "hostile discrimination" towards members of the bargaining unit. *Steele v. Louisville & N. R. Co.*, 1944, 323 U.S. 192, 203. Although the rationale that express statutory authority is necessary to award punitive damages as a remedy for violations of a federal statute is somewhat inapposite where the statutory duty itself is only implicit, the Court does not believe the *Steele* doctrine authorizes such relief. No case has yet gone so far. Moreover, the very threat of punitive damages, as a remedy for violations of a duty which in effect limits the scope of collective bargaining between labor and management, may have unforeseeable effects upon the institution of free collective bargaining itself. In this situation, the fact that the duty itself has been read into the Act by the courts may well be cause to limit the relief obtainable to equitable remedies and compensatory damages. Because of this danger, the duty itself has been restricted by the courts and gives only limited protection. Under these circumstances, the Court does not believe punitive damages may be recovered in actions based upon the *Steele* doctrine. [196 F. Supp. at 504-505, footnotes omitted.]

See also Judge Wright's discussion with respect to the first cause of action (based on § 2, Eleventh, of the RLA), *id.* at 506, quoted at p. 33, *infra*.

¹⁶ Judge Kerr wrote:

Punitive damages are, by their very nature, designed not to compensate for losses sustained but to punish for wrongs done.

the ironies here is that the Court of Appeals approved the District Court's unexplained refusal in this case to follow a prior decision of another judge of the same District Court, and did so without stating why it disagreed with the reasoning of the earlier decision.

The Court of Appeals did advert to *Butler v. Local U. 823, Int. Bro. of Teamsters, etc.*, 514 F.2d 442, 454 (C.A. 8), in which an award of punitive damages was reversed. In *Butler*, the Eighth Circuit only assumed "arguendo" that punitive damages would ever be proper against an employer for breach of contract or against a union for breach of the duty of fair representation.¹⁷

The single case cited below which did sustain a punitive damage award is *Harrison v. United Transp. Union*, 530 F.2d 558 (C.A. 4), cert. denied, 425 U.S. 958. The *Harrison* court opined that because:

Though not free of doubt, entirely, it would appear that the claim for punitive damages as against the Union cannot stand, see *Vaca v. Sipes*, above; see also *Local 127, United Shoe Workers v. Brooks Shoe Manufacturing Co.*, 298 F.2d at 284, above, wherein an award for punitive damages under 29 U.S.C.A. § 185 was disallowed; the appellate court, noting that the general purpose of the federal labor laws is to supply remedies, rather than punishment, stated, "[T]he type of relief contemplated under Section 301 was remedial as distinguished from punitive." Accord, *Williams v. Pacific Maritime Association*, 421 F.2d 1287 (9th Cir. 1970). The claim for punitive damages as against the union is therefore one for which relief cannot be granted and the motion to strike this claim is granted. (386 F. Supp. at 295.)

¹⁷ The Court below also cited another Eighth Circuit case, *Emmanuel v. Omaha Carpenters Dist. Council*, 560 F.2d 382, 386, which likewise left that issue open.

The decision below notes that "[t]he *Butler* court also mentioned that the federal courts should fashion remedies under the labor statutes with a view to achieving a goal of industrial peace." (Pet. 18a.) But the Tenth Circuit did not indicate whether it agreed with that proposition nor state whether punitive damages would promote that objective, let alone how. The only opinions discussing the effect of such damages have expressed the view that punitive remedies disserve industrial peace. See pp. 32 and 33, *infra*.

[I]t is not unusual in a fair representation suit against a union to find the liability for compensatory damages to be *de minimis*, * * * unless punitive damages are available, an employee may lack the strong legal remedy necessary to protect his right against a union which has either maliciously or in utter disregard of his rights denied him fair representation * * * even in those cases where compensatory damages may be merely nominal. [530 F.2d at 563, citing *Basista v. Weir*, 340 F.2d 74, 87 (C.A. 3) (punitive damages are recoverable in suits under 42 U.S.C. § 1983).]

Since the availability of punitive damages under 42 U.S.C. § 1983 was expressly reserved last Term in *Carey v. Piphus*, 435 U.S. 247, 257, n.11, the *Basista* line of authority does not provide a basis in precedent for the punitive damage award here. Moreover, with dockets already crowded by lawsuits brought by persons who have suffered actual injury and seek recompense therefore, it may well be questioned whether it is a wise allocation of judicial resources to encourage litigation solely for its punitive or deterrent effect. In any event, for present purposes, it suffices that this asserted justification for punitive damages is wholly unacceptable in the labor relations context.

As we have shown earlier, pp. 17-18, the *least* that *Vaca* can be said to have decided with respect to punitive damages is that they may not be recovered against a party which is liable for no or only minimal compensatory damages. (See also *Linn v. Plant Guard Workers, supra*, 383 U.S. at 66, discussed at pp. 23-24, *supra*.¹⁸)

¹⁸ While *Linn*'s substantive restrictions on state defamation actions arising out of labor disputes were based on an analogy to *New York Times Co. v. Sullivan*, 376 U.S. 254, its holding that punitive damages may not be recovered in such cases absent compensatory damages has not been adopted outside the labor relations context. Cf. *Rosenbloom v. Metromedia*, 403 U.S. 29, 72-77, where only Mr. Justice Harlan proposed such a rule as a matter of

To foster litigation by providing employees with potential windfalls is wholly inconsistent with the national labor policy. The practical realities underlying that policy were succinctly stated by Chief Justice Warren dissenting in *Russell, supra*:

In Alabama, as in many other jurisdictions, the theory of punitive damages is at variance with the curative aims of the Federal Act. The jury in this case was instructed that if it found that the defendant was "actuated by ill-will" it might award "smart money" (punitive damages) "for the purpose of making the defendant smart . . ." The parties to labor controversies have enough devices for making one another "smart" without this Court putting its stamp of approval upon another. I can conceive of nothing more disruptive of congenial labor relations than arming employee, union and management with the potential for "smarting" one another with exemplary damages. Even without the punitive element, a damage action has an unfavorable effect on the climate of labor relations. Each new step in the proceedings rekindles the animosity. Until final judgment the action is a constant source of friction between the parties. [356 U.S. at 653, footnote omitted.]

The foregoing is, of course, not authoritative as precedent, but the force of the late Chief Justice's reasoning merits approval.¹⁹ So, too, the District Court in *Brady, supra*, correctly reasoned:

constitutional law in defamation cases. Cf. the dissenting opinion of Justice Marshall, joined by Justice Stewart in *Rosenbloom, id.* at 81-87 and the Court's opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-350, discussed at pp. 42-43, *infra*.

¹⁹ The majority in *Russell* did not disagree with this observation, but rather held that since federal law did not preempt the state's authority to act, it was for the state to determine the sanctions for violations of its law. (See p. 23, *supra*.)

Moreover, the regulation of the economic relations between labor and management is an exceedingly delicate matter, and this Court is unwilling to employ the crude device of punitive damages as a remedy in causes founded on a detailed and pervasive federal statutory scheme without express authorization from Congress. See *United Mine Workers of America v. Patton*, 4 Cir., 1954, 211 F.2d 742, 47 A.L.R. 2d 850. [196 F.Supp. at 506.]

As the *Brady* opinion indicates, in *Harrison* the Fourth Circuit not only disregarded the pertinent precedents in this Court but also its own earlier soundly-reasoned decision on punitive damages in *United Mine Workers v. Patton, supra*. Much of what Chief Judge Parker there wrote is equally in point here:

Where Congress has intended that damages in excess of the actual damage sustained by plaintiff may be recovered in an action created by statute, it has found no difficulty in using language appropriate to that end. Thus, in copyright cases, 17 U.S.C.A. § 1, in patent cases, 35 U.S.C.A. § 284, and in antitrust cases, 15 U.S.C.A. § 15, the right to recover treble damages is expressly given. There is nothing in the language of the statute here under consideration [§ 303 of the LMRA], however, or in its history, that indicates that Congress intended that anything more than actual damages be recovered.

In the absence of anything in the act itself or in its history indicating an intention on the part of Congress to authorize the recovery of punitive damages by this highly controversial legislation, the courts would not be justified, we think, in construing it to permit such recovery. In *Amazon Cotton Mill Co. v. Textile Workers Union of America*, 4 Cir., 167 F.2d 183, 186, which dealt with the same statute, we quoted with approval the language of the Supreme Court in a case involving the Railway Labor Act, 45 U.S.C.A. § 151 et seq., to the effect

that, " 'The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.' " We are still of that opinion. In the light of the history of recent labor legislation, it is hardly conceivable that Congress could have intended to vest in the courts the power to punish unions by awards of punitive damages. Certainly, in the struggle over this act, which was vetoed by the President and passed by the Congress over his veto, no one ever suggested, so far as we are advised, that punitive damages could be awarded under its provisions. [211 F.2d at 749-750.]

Our demonstration to this point calls for the conclusion that punitive damages are not recoverable in the instant case. But we have concluded this portion of our discussion by quoting the *Patton* opinion, not only because of its perceptive observations concerning the national labor policy, but also because at least implicit in Judge Parker's analysis is what appears to us to be a sound approach to the problem of determining whether punitive damages are recoverable in suits to vindicate rights or enforce duties under federal statutes generally.

D. A Generally Applicable Principle of Construction. *Patton* contrasts certain federal statutes, in which "the right to recover treble damages is expressly given", with the statute at issue (§ 303 of the LMRA), the language and history of which contain "nothing" that "indicates that Congress intended that anything more than actual damages be recovered." (211 F.2d at 749, see p. 33, *supra*, where this paragraph of the opinion is quoted in full.²⁰) Judge Parker thus drew from the fact that Congress had in some statutes expressly provided for dam-

²⁰ While the evidence from the history of § 303 which Judge Parker there arrayed actually negated an intent to permit punitive damages, this only served to strengthen his ultimate conclusion.

ages in excess of those actually sustained by the plaintiff the proposition that the intent to allow such damages under a federal statute should be attributed to Congress only if such intent affirmatively appears in the statute's language or from its legislative history. For the reason we now develop, we submit that this is the proper rule of construction.

(1). Legislative developments since the *Patton* case was decided reinforce its premise that Congress knows how to provide for damages in excess of actual losses when it wishes to do so.²¹ In addition to the copyright, patent and antitrust laws which were referred to in the *Patton* opinion, there are now, for example, Title VIII of the Civil Rights Act of 1968²², Title III of the Omni-

²¹ This Court has equated "exemplary damages for fraud [with] the punitive two-thirds portion of a treble damage antitrust recovery." (*Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 427.) See also, L. Hand, J. in *Lyons v. Westinghouse Electric Corporation*, 222 F.2d 184, 189 (C.A. 2): "The remedy provided is not solely civil; two-thirds of the recovery is not remedial and inevitably presupposes a punitive purpose."

We note, however, that not all recoveries in excess of single damages are punitive in nature. For example, § 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), provides that an employee may recover unpaid minimum wages of unpaid overtime compensation and "an additional equal amount as liquidated damages." These liquidated damages "are compensation, not a penalty or punishment by the Government. The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages." (*Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 583.)

²² Public Law 90-284, 82 Stat. 73 *et seq.* Section 812(c) of the Act, 82 Stat. 88, 42 U.S.C. § 3612(c) provides that in a civil suit to enforce §§ 803-806 of the Act:

The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than \$1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

bus Crime Control and Safe Streets Acts of 1968²³; the Bank Holding Company Act Amendments of 1970²⁴; the Equal Credit Opportunity Act²⁵; and the Truth in Lending

²³ Public Law 90-351, 82 Stat. 197 *et seq.* Section 802, 82 Stat. 223, amended 18 U.S.C. § 2520 to provide in pertinent part:

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

- (a) actual damages but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher;
- (b) punitive damages; and
- (c) a reasonable attorney's fee and other litigation costs reasonably incurred. * * *

²⁴ Public Law 91-607, 84 Stat. 1760 *et seq.* Section 106(e), 84 Stat. 1767 (12 U.S.C. § 1975(e)) provides:

Any person who is injured in his business or property by reason of anything forbidden in section 106(b) of this Act may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of suit, including a reasonable attorney's fee.

²⁵ Title V of Public Law 93-495, 88 Stat. 1521 *et seq.*, adding a new Title VII to Public Law 90-321, 82 Stat. 146. As amended in 1976 by § 6 of Public Law 94-239, 90 Stat. 253, 15 U.S.C. § 1691(e), the civil liability provision enforcing the Equal Credit Opportunity requirements provides in pertinent part as follows:

(a) Any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class.

(b) Any creditor, other than a government or governmental subdivision or agency, who fails to comply with any require-

Act.²⁶ And, when Congress revised and codified the copy-

ment imposed under this subchapter shall be liable to the aggrieved applicant for punitive damages in an amount not greater than \$10,000, in addition to any actual damages provided in subsection (a) of this section, except that in the case of a class action the total recovery under this subsection shall not exceed the lesser of \$500,000 or 1 per centum of the net worth of the creditor. In determining the amount of such damages in any action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

The 1976 amendments raised the total amount recoverable in a class action from \$100,000 to \$500,000. Compare Public Law 93-495, § 503, 88 Stat. 1524.

²⁶ Public Law 90-321, 82 Stat. 146 *et seq.* Originally, § 130 of the TILA provided a civil penalty of twice the amount of the finance charge imposed, but no less than \$100. See *Mourning v. Family Publications Service*, 411 U.S. 356, 376. As most recently amended by § 4 of Public Law 94-240, 90 Stat. 260, the civil liability provision, 15 U.S.C. § 1640, provides in pertinent part as follows:

(a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of the failure;

(2) (A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than \$100 nor greater than \$1,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the

right law, it gave the copyright owner the option of suing to recover actual damages and profits or statutory damages, the amount of which was also detailed.²⁷

lesser of \$500,000 or 1 per centum of the net worth of the creditor; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

²⁷ 17 U.S. § 504(c), 90 Stat. 2585 provides as follows:

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$250 or more than \$10,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$50,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court [in] its discretion may reduce the award of statutory damages to a sum of not less than \$100. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or photorecords; or (ii) a public

(2). Consideration of the special characteristics of punitive damages lends further support to the rule of construction which we propose. It does so whether the focus is on the avowed objectives of that remedy, or on the criticisms which have been raised against it. As was succinctly stated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, punitive damages "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."²⁸ But these purposes do not provide a principled basis for determining under what statutes punitive damages should be permitted. Whenever Congress passes a law declaring certain conduct unlawful, it plainly wishes, at the very least, to deter that conduct. Whether certain means—in this instance, punitive damages payable to a private party—advance that goal, and even if so, whether that means in some way endangers other Congressional objectives, are paradigm examples of the elusive policy decisions which, in our democratic system, the legislature rather than the courts should make. So, too, is the judgment whether the forbidden conduct is so undesirable or contrary to the good order of the community that offenders should be subject to punishment, and if so, whether the punishment should take the form of a private fine.

Punitive damages have also been defended as

a partial remedy for the defect in American civil procedure which denies compensation for actual ex-

broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in subsection (g) of section 118) infringed by performing a published nondramatic literary work or by a reproducing a transmission program embodying a performance of such a work.

²⁸ See also Prosser, *Torts*, p. 9 (4th ed. 1971): "Such damages are given to the plaintiff over and above the full compensation for his injuries, for the purpose of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example.

penses of litigation, such as counsel fees, and as an incentive to bring into court and redress a long array of petty cases of outrage and oppression which in practice escape the notice of prosecuting attorneys occupied with serious crime, and which a private individual would otherwise find not worth the trouble and expense of a lawsuit.²⁹

But punitive damages are a clumsy and inexact substitute for attorney's fees, since they are available only in a certain class of cases, and in those cases in which they may be awarded, normally bear no relationship to the plaintiff's actual litigation expenses, and are usually far greater. Even more to the point, when Congress wishes to provide attorney's fees for successful plaintiffs it knows how to do so, as, for example, in § 718 of Title VII, the Emergency School Aid Act, 20 U.S.C. § 1617 (1970 ed., Supp. II), (part of the Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 235, 369); and, the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, Pub. L. 94-559. Congress has also shown that it is fully capable to determine whether to encourage private litigation, and when it wishes to do so, to select the appropriate degree of encouragement, be it to authorize attorney's fees to the plaintiff, or to permit recovery of more than actual damages. (See pp. 35-38, *supra*.) Mr. Justice Jackson has indicated the delicacy of that task in outlining the competing considerations for and against commissioning such private attorneys general:

Where the interests of individuals or private groups or those who bear a special relation to the prohibition of a statute are identical with the public interest in having a statute enforced, it is not uncommon to permit them to invoke sanctions. This

²⁹ *Id.*, p. 11. Dean Prosser was not endorsing punitive damages but was outlining the arguments which have been advanced for and against them.

stimulates one set of private interests to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement, which relieves the Government of cost of enforcement. Such private remedies lose, of course, whatever advantage there may be in the presumed disinterested, public interest standards and expertness of a governmental agency which has the initiative control of retributory measures. It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney's fee. [*Bruce's Juices v. American Can Co.*, 330 U.S. 743, 751-752.]³⁰

In selecting a rule of determining whether punitive damages should be permitted in a claim arising under a federal statute where neither the language nor the legislative history shows that Congress contemplated this

³⁰ The court below does not appear to have made any independent examination of the propriety of permitting punitive damages. If its reference to *Harrison* is to be taken as adopting the Fourth Circuit's reasoning on this point, then the decision below rests on the supposed desirability of encouraging fair representation litigation. See 530 F.2d at 563 quoted and discussed at 30-33, *supra*. A further objection to that theory is that punitive damages encourage vexatious as well as meritorious litigation. (Cf. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737-744.) Because the potential recoveries are so great, suit may be brought on the mere hope that the court will allow the case to go to the jury and that the jury will return a sizeable verdict. Moreover, because defendants cannot estimate the extent of their potential exposure with any degree of accuracy, extraordinary pressure is placed on them to settle claims even though they reasonably believe that they have committed no violation and should have to pay no damages.

remedy its disadvantages must also be considered. Cf. *Blue Chip Stamps, supra*, 421 U.S. at 737.

Since our point is not that punitive damages are to be banned, but rather that they should be permitted in an action arising under a federal statute only when Congress has made clear that it so intends, we shall not here rehearse all the criticisms of this doctrine. But we deem particularly pertinent in this connection the severe strains which this harsh remedy imposes on the primary responsibility of the courts to accord to all parties a fair trial. When a plaintiff claims punitive damages he may introduce evidence of the defendant's wealth because it is deemed relevant to determining the amount of damages necessary to deter or punish the defendant; yet such evidence is normally inadmissible because it is irrelevant to the merits of the case, and because of its serious potentially prejudicial effect. Additionally, the effort to maximize the award inevitably leads to inflammatory jury arguments by plaintiff's counsel, likewise unrelated to the merits.³¹ Both cannot help but infect consideration of the issues of liability and the amount of compensatory damages.

As Mr. Justice Powell wrote for the Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350:

In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views.

³¹ See, for example, counsel's argument in this case charging the union with "disdain" for the jury because the individual defendants did not appear in court (A. 58).

And as Mr. Justice Marshall explained, dissenting in *Rosenbloom v. Metromedia*, 403 U.S. 29, 84:

The unlimited discretion exercised by juries in awarding punitive and presumed damages compounds the problem of self-censorship that necessarily results from the awarding of huge judgments. This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others. Such free wheeling discretion presents obvious and basic threats to society's interest in freedom of the press. And the utility of the discretion in fostering society's interest in protecting individuals from defamation is at best vague and uncertain. These awards are not to compensate victims; they are only windfalls. Certainly, the large judgments that can be awarded admonish the particular defendant affected as well as other potential transgressors not to publish defamation. The degree of admonition—the amount of the judgment in relation to the defamer's means—is not, however, tied to any concept of what is necessary to deter future conduct nor is there even any way to determine that the jury has considered the culpability of the conduct involved in the particular case. Thus the essence of the discretion is unpredictability and uncertainty.

While the foregoing were written in the context of state law defamation suits, the lack of standards to confine the amount awarded is endemic to the punitive damage remedy. Because of this sweeping discretion, juries are enabled to punish not only unpopular views but also unpopular defendants.³²

³² See, e.g., in addition to the cases cited at p. 24, n.12, *supra*: *United Workers v. Laburnum Corp.*, *supra*, 347 U.S. at 658 (\$100,000 punitive damages); *Lassiter v. Operating Engineers Union*, 349 So. 2d 622 (Fla. Sup. Ct.) (setting aside on evidentiary grounds a punitive damage award of \$700,000 against a national union and \$300,000 against a local union in a claim arising

Punitive damages, in short, are strong medicine. Their potential adverse consequences often are more harmful than the disease sought to be cured. The calculation of when there will be a beneficial effect is complex. And, precisely for that reason, that remedy should not be administered unless the prescription has been written by Congress.³³

Since there plainly is no evidence in the RLA that Congress contemplated the award of punitive damages for the type of wrong the jury found occurred here, the award of those damages should therefore be reversed.³⁴

out of a local officer's assault on a member); *New York Times Co. v. Sullivan*, 376 U.S. 254, 256, 262 (\$500,000 verdict, not differentiated between compensatory and punitive damages, against publisher and individual civil rights leaders); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 138 (punitive damage verdict of \$3,000,000, reduced to \$400,000 by trial court); *NAACP v. Overstreet*, 384 U.S. 118, 119, dissenting opinion (\$50,000 punitive damage verdict for tortious consumer picketing).

³³ Because we are proposing a rule for the construction of federal statutes, the long line of cases in this Court beginning with *Day v. Woodworth*, 13 How. (54 U.S.) 363, which permit the award of punitive damages does not militate against our proposal. For *Day* was a common law action of trespass for tearing down and destroying a mill dam, brought in the federal courts under the diversity jurisdiction (13 How. at 363); the issue of punitive damages was decided there, and in the many cases following *Day* under the aegis of *Swift v. Tyson*, 16 Pet. (41 U.S.) 1. Since that method of decision has been discredited by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, it is now clear that the federal courts must apply the state law of punitive damages when a claim arises under state law and must derive from the federal statute and its policy the scope and nature of a lawful claim. The passage from *Steele*, quoted at the outset of our argument, p. 9, *supra*, is but one of countless instances where the latter obligation has been recognized.

³⁴ We recognize, of course, that since the duty of fair representation and the civil action to enforce that duty were implied from the RLA, that no evidence could possibly be found that Congress intended punitive damages would be available to indicate that particular right. But this is not a valid objection either to our proposal or to its applicability herein. In this connection it is necessary for clarity of analysis to bear in mind the distinction be-

II. PUNITIVE DAMAGES COULD NOT PROPERLY BE AWARDED ON THIS RECORD.

We accept, as we must, given the limited grant of certiorari, that the Union, by filing Foust's grievance two days out of time, breached its duty of fair representa-

tive implication of a *duty* and judicial implication of a *private cause of action for breach of an express or implied duty*. (We happen in the present case to be dealing with a situation in which both the duty and the right to sue are implied. When the *Steele* Court implied the duty of fair representation, it inevitably followed *Texas & N.O.R. Co.*, *supra*, and *Virginian Railway Co.*, *supra* (p. 25, *supra*), which had implied a private action to enforce the duties which are expressly declared in the RLA. (See *Steele*, 323 U.S. at 207.)

First, The rule we propose does not require that Congress be shown to have contemplated the specific type of claim; our test would be met by a showing that the legislature intended that remedy to be available for claims generally under the same statute. Thus, if a statute provided for private actions in which punitive damages were recoverable for claims based on violations of an express duty, such damages would, under our thesis, be available also in suits to enforce implied duties. Of course, where Congress differentiates between claims which do, and those which do not give rise to a claim for punitive damages under a statute the Court's task would be to find the most fitting analogy. (Compare our discussion of § 2, Tenth of the RLA at pp. 25-28, *supra*.)

Second, it by no means follows from the fact that a cause of action for compensatory damages to enforce statutory rights (either express or implied) may properly be implied, that a cause of action for punitive damages may also be implied. To cite a familiar example, an implied cause of action has been recognized under § 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, but punitive damages have consistently been disallowed by the Courts of Appeals. (See, e.g., *Green v. Wolf Corp.*, 406 F.2d at 291, 302-303 (C.A. 2), cert. denied, 395 U.S. 977; *Baumel v. Rosen*, 421 F.2d 571, 576 (C.A. 4), cert. denied, 396 U.S. 1037; *De Haas v. Empire Petroleum Co.*, 435 F.2d 1223 (C.A. 10).) Indeed, to go so far as to imply from the substantive provisions of a statute not only that Congress intended enforcement through a private cause of action, but additionally that Congress intended that punitive damages might be recovered in such suits, would be a wholly unwarranted exercise of judicial creativity.

tion. But this is not sufficient to support an award of punitive damages, even if, contrary to our submission in Part I, such damages are sometimes allowable in RLA fair representation cases.³⁵

In *Jones v. Mayer Co.*, 392 U.S. 409, the Court held that the plaintiffs had stated a cause of action under 42 U.S.C. § 1982. In discussing the remedies which would be available to the plaintiffs on remand, and contrasting the remedial scheme of § 1982 with that of the Civil Rights Act of 1968, the Court said: "In no event, on the facts alleged in the present complaint, would the petitioners be entitled to punitive damages." (*Id.* at 415, n.9 continued, citing *Philadelphia, etc. Ry. Co. v. Quigley*, 21 How. (62 U.S.) 202.)³⁶

In *Quigley*, the Court had stated:

In *Day v. Woodworth* this court recognized the power of the jury in certain actions of tort to assess against the tort-feasor punitive or exemplary damages. Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act; the word implies that the wrong complained of was conceived in the spirit of mischief, or criminal in-

³⁵ An additional reason why the jury should not have been permitted to award punitive damages is that the evidence of the defendant union's responsibility for the breach of the duty was insufficient to justify imposition of punitive damages against it. However, this issue was not preserved in the Court of Appeals, and we therefore do not assert this additional ground for reversal here.

³⁶ The Court does not appear to have decided the question whether punitive damages are ever available under 42 U.S.C. § 1982.

differences to civil obligations. [21 How. (62 U.S.) at 213-214.]³⁷

And, in *Carey v. Piphus*, 435 U.S. 247, 257, n.11, although the Court left open the question whether punitive damages can ever be recovered in a suit under 42 U.S.C. § 1983, it squarely held that "there is no basis for such an award in this case. The District Court specifically found that petitioners did not act with a malicious intention to deprive respondents of their rights or to do them other injury * * *; and the Court of Appeals approved only the award of "non-punitive" damages, 545 F.2d 30, 31 (1976)." In the absence of malice punitive damages could not be recovered even though it was established by the proceedings below that the petitioners "should have known that a lengthy suspension without any adjudicative hearing of any type" would violate procedural due process." (435 U.S. at 251.)

The standard for the recovery of punitive damages suggested by *Jones* and *Carey* is in accord with the prevailing modern rule. For example, the District of Columbia Circuit recently ruled:

³⁷ See also *Milwaukee, etc. Ry. Co. v. Arms*, 91 U.S. 489, 492, where the Court followed *Quigley* and added:

"Gross negligence" is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term "ordinary negligence;" but, after all, it means the absence of the care that was necessary under the circumstances. In this sense the collision in controversy was the result of gross negligence, because the employees of the Company did not use the care that was required to avoid the accident. But the absence of this care, whether called gross or ordinary negligence, did not authorize the jury to visit the Company with damages beyond the limit of compensation for the injury actually inflicted. To do this, there must have been some willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Nothing of this kind can be imputed to the persons in charge of the train; and the court, therefore, misdirected the jury. [*Id.* at 495].

It is a cardinal rule that punitive damages may be awarded to punish a defendant for the outrageous nature of his conduct and to deter the defendant and others from engaging in the same or similar acts. *See, e.g., Chesapeake & Potomac Telephone Co. v. Clay*, 90 U.S.App.D.C. 206, 194 F.2d 888, 891 (1952); W. Prosser, *Law of Torts*, *supra*, § 2, at 9-10. As such, mere inadvertence or even gross negligence will not suffice to support an award of punitive damages. *See id.* The tort must be "aggravated by evil motive, actual malice, deliberate violence or oppression." *Black v. Sheraton Corp. of America*, 47 F.R.D. 263, 271 (D.D.C. 1969).³⁸

In his treatise, which was cited with approval in *Nader*, Dean Prosser wrote:

Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton. Lacking this element, there is general agreement that mere negligence is not enough, even though it is so extreme in degree as to be characterized as "gross," an unhappy term of ill-defined content, which occasionally, in a few jurisdictions, has been stretched to include the element of conscious indifference to consequences, and so to justify punitive damages. Still less, of course, can such damages be charged against one who acts under an innocent mistake in engaging in conduct that nevertheless constitutes a tort.³⁹

³⁸ *Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527, 549 (C.A.D.C.) reversed on another issue, 426 U.S. 290. (Certiorari was not sought with respect to the Court of Appeals ruling on punitive damages, see *id.* at 295.)

³⁹ Prosser, *Torts*, pp. 9-10 (4th ed. 1971) (footnotes omitted).

The Court of Appeals in the present case did not discuss any of the foregoing authorities. It referred only to decisions of the Eighth and Fourth Circuits in duty of fair representation cases, and acknowledged that it was establishing a less demanding standard for awarding punitive damages than was declared in those cases⁴⁰:

We are not convinced that actual animosity or express malice or premediated malice are essential to the award of punitive damages. Wanton conduct or reckless disregard for the rights of the employee should suffice. [Pet. 18a.]

The court below did not explain what it meant by the terms "wanton conduct" and "reckless disregard". But it is clear that the Tenth Circuit applied a standard totally inconsistent with what we have shown to be the law. That court itself described the defendants' violation in the following terms:

In the case at bar the violation of duty relied upon was the failure of the Union to act within the time provided in the Collective Bargaining Agreement. True, the time available to the Union was limited. This, however, does not excuse their having needless correspondence back and forth and insisting that they have an authorization from the plaintiff with respect to representation by the attorney who is seeking to get them to act. [Pet. 10a.]

We submit that this very statement establishes that the defendants were negligent, but no more than that.

⁴⁰ The court below recognized that in *Butler* (p. 30, *supra*), the "Eighth Circuit expressed the view that in order to have exemplary damages, there had to be express malice." (Pet. 18a. See 514 F.2d at 454.) The court below also observed that in *Harrison*, pp. 30-31, *supra*, the Fourth Circuit "rejected the necessity for having actual malice in the sense of personal animosity." The instruction which was there approved was that the jury "might award punitive damages if it found that UTU acted wantonly or maliciously or that it acted recklessly or in callous disregard of Harrison's rights, or that Harrison's rights were disregarded with unnecessary harshness or severity". (530 F.2d at 563.)

There is nothing here of the kind of aggravated misconduct or "malice" which the authorities require, or even that state of mind normally connoted by the courts' own words, "wanton conduct" and "reckless disregard". And in case more needs to be said, we add the following:

In *Carey v. Piphus, supra*, the Court held that punitive damages were not available, even though the defendants should have known that their action denied the plaintiffs' constitutional rights. Here, the evidence, at the very most, permits the inference that the defendants should have known that their "needless correspondence back and forth" would result in the untimely filing of the grievance.⁴¹ The court below acknowledged that "the time available to the Union was limited". The reason that it was so limited was that, of the sixty days provided by the collective agreement, fifty-two days had been used up by plaintiff and his attorney, Mr. Moriarity. As Mr. Moriarity testified:

I recall some time later we waited and kept hoping for a reply and we never got any. I finally called Mr. Jett and Mr. Jett said that, well, they just hadn't had a chance to look at it and that he thought it was going to be final, but he would let me know. And he never let me know and I kept waiting and waiting.

Finally I called him and it was because I was worried; the Rule says something about sixty days that the grievance has to be filed. [A. 52]

It was only after that call, on the fifty-first day, that counsel wrote the Union, asking it to file a grievance. Mr. Moriarity did not cause his client to file the grievance as he clearly was authorized to do under *Elgin, J. & E. Ry Co. v. Burley, supra*, 325 U.S. 711, on rehearing, 327 U.S. 661. And, it is that case which generated

⁴¹ The Court of Appeals did not attribute such an inference to the jury; and we do not concede that it could reasonably have been drawn.

the Union officials' concern regarding the sufficiency of counsel's letter as authority to file a grievance on Foust's behalf. For *Burley* held that absent proper authority from the grievant himself, the resolution of the grievance between a union and an employer is not binding on the employe. It may be that insistence on authorization from Foust himself was, as a matter of law, needless, as the Court of Appeals held, but such an error of law cannot give rise to a punitive damage award. Compare *Carey v. Piphus, supra*, where the error of law was found to be unjustified.

In sum, if the distinction between negligence and misconduct which justifies punitive damages is to be preserved, the award of punitive damages here must be reversed.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be reversed and the cause remanded to the District Court with directions to reduce the judgment to \$40,000 by eliminating the award of "\$75,000 punitive or exemplary damages" (A. 90).

Respectfully submitted,

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Appendices

APPENDIX A**STATUTE INVOLVED**

Section 2 of the Railway Labor Act, 44 Stat. 577 (1926) as amended by 48 Stat. 1185 (1934) etc., 45 U.S.C. §§ 151-188, provides as follows:

GENERAL PURPOSES

SEC. 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

GENERAL DUTIES

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purpose of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with manage-

ment during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences), then in effect between the parties.

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral

persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof of the carrier, officer, or agent offending shall be subject to a fine of not less than \$1,000, nor more than \$20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United

States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirements of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hosting service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of Section 2 of this Act in conflict herewith are to the extent of such conflict amended.

APPENDIX B

EXCERPTS FROM DEPOSITION OF DEAN F. JONES

(DEAN F. JONES, called as an adverse party witness by the plaintiff, having been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:)

MR. URBIGKIT: This is a deposition that is taken pursuant to the federal rules by notice. Objections, except to the form of the question, will be reserved for trial.

Is there any other stipulation that you would like to have, Mr. Hickey?

MR. HICKEY: None.

Q (By Mr. Urbigkit) Directing your attention to the period 1970, '71, at that time did you hold any position as an officer or representative of the International Brotherhood or of the local of the IBEW?

A I did. District chairman.

Q Would you tell me whether district chairman is a position with the local or with the International?

A With the International.

Q And what is the area of your assigned responsibilities as district chairman?

A The area would be the eastern district of the Union Pacific.

Q So that responsibility would encompass more than the local of which you were a member?

A Correct.

Q That's district chairman?

A District chairman.

Q I see. How many positions of like kind would there have been with the Union Pacific in your union?

A At various times it varied. There should have been approximately four of them.

Q When did you assume that responsibility?

A Oh, approximately 1968.

Q How long did it continue?

A Until about 1973 or '74.

Q Would you describe to me the responsibilities of district chairman?

A Filing and handling of claims and grievances of men in the craft.

Q Were there other persons of a like position for the same geographical area with your local?

A No.

* * * *

Q (By Mr. Hickey) * * * How much were you paid by the union?

A Nothing.

Q You didn't receive any compensation for your services?

A I never even received postage stamps.

Q Now, you said you held this position as district chairman for some five or six years and that you were headquartered at Rawlins?

A Yes.

Q Did you have offices there or where would you be headquartered?

A It was my point of work.

Q That is where you went to work for the Union Pacific?

A Yes.

Q Where was your office?

A In my house.

Q Oh. You were operating out of your house for no compensation?

A Right.

* * * *

Q (By Mr. Hickey) All right, sir. Now, let me ask you this: In your direct examination counsel for the plaintiff asked you if you ever filed a claim on behalf

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of an employee subject to your authority as a district chairman or upon the request of an attorney or lawyer representing such an employee.

A Oh, I never have had . . .

Q What is your answer?

A No.

Q You had not?

A No.

Q Had you at any time in the course of your duties as district chairman ever handled any matter or had any dealings with any representative of Union Pacific with respect to any injuries incurred by an IBEW member in the course of his employment with the Union Pacific?

A No.

* * * *

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APPENDIX C

LETTERS FROM D. F. JONES TO L. D. FOUST

Rawlins, Wyoming
April 5, 1971

Mr. L. D. Foust
1502 Adams Avenue
Cheyenne, Wyoming 82001

Dear Mr. Foust:

This with reference to letter of March 26, 1971 received from Attorney Edward P. Moriarity relative to grievance in your behalf.

It is proper procedure for the employee to make his claim or grievance known in writing to the District Chairman for consideration for handling with the Carrier in accordance with provisions of the Agreement. As you are very well aware, Rule 21 provides that all claims or grievances must be presented in writing *by* or on behalf of the employee involved, that is why it is necessary to receive in writing authority to handle claims or grievances for further handling.

Upon receipt of your grievance in writing, and request to the undersigned to handle your initial claim pertaining to the Carrier terminating your service, it will be reviewed and handled under the proper grievance procedures of the current Agreement.

Yours truly,

/s/ D. F. Jones
D. F. JONES
District Chairman

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Rawlins, Wyoming
April 9, 1971

Mr. L. D. Foust
1502 Adams Avenue
Cheyenne, Wyoming 82001

Dear Mr. Foust:

With further reference to letter of March 26, 1971 from your Attorney Mr. Edward P. Moriarity in connection with grievance in your behalf.

This to advise you that I as District Chairman, Seniority District No. 1, am the employee's duly authorized representative to handle initial claims and grievances as per Rule 21, if and when the claims or grievances are presented in writing, stating the nature of the rule violation as per controlling agreement.

As to your claim filed with office on June 17, 1970 relative to your personal on duty injury, I stated to you by telephone at that time, there are no provisions by agreement for filing claims due to medical reasons or injuries under the terms of the present agreement when employee's are withheld from service by Doctors orders, and suggested at that time you engage legal assistance to file your claim for injuries under the terms of the Federal Liability Act, and it is my understanding that you did just so. As you are aware, we do not have control over the Medical Profession, if and when they withhold employees from service. In practically all the awards, the Adjustment Board has ruled in favor of the Carrier whereas their Doctors have withheld employee's from service due to Medical or injuries.

In conclusion, I wish to make it clear that you can expect full cooperation from this office in assisting your Attorney in any way possible. Furthermore, any misunderstanding relative to our telephone conversation, I

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nor any other officer of the IBEW have never refused to handle any claim or grievance under the terms of the agreements.

Yours truly,

/s/ D. F. Jones
D. F. JONES
District Chairman

cc: Mr. Edward P. Moriarity

NO. 78-38

JAN 5 1979

SHAIK RUDAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1977

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, ET AL.,**

Petitioners,

vs.

LEROY FOUST,

Respondent.

BRIEF FOR RESPONDENT

TERRY W. MACKEY
Attorney for Respondent

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In the
Supreme Court of the United States

OCTOBER TERM, 1977

NO. 78-38

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, ET AL.,

Petitioners.

vs.

LERoy FOUST,

Respondent.

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Respondent would make the following addition to the statement of the case in Petitioner's Brief:

Upon receipt of notice from Foust that he sought the assistance of his union to represent him in his wrongful discharge by the carrier, his union representative took no action to protect Foust's interest until he first contacted the union superior in Omaha, Nebraska. (Ex. 25, P. 20).

The union had knowledge of Foust's wrongful discharge the day after it occurred, February 4, 1971 (Ex. 28, P. 30),

and Wisniski requested information about the discharge from Mr. Jones (Ex. 28, P. 31).

The union took action internally but never set the wheels in motion to facilitate the grievance procedure for Foust until after the time for filing the grievance had expired. Attorney Moriarity wrote to Jones on March 26, and notified him of the need for union assistance (Ex. 24, pp. 4a-6a infra). That request was received by Jones on March 27 (Ex. 29, p. 7a infra). Jones then contacted Wisniski. Wisniski then prepared correspondence to be sent by Jones to Foust (Ex. 29, p. 13a infra). All of this correspondence (a part of Exhibit 29) is attached as an appendix to this Brief for ease of reference.

After Wisniski mailed the correspondence to Jones to be sent to Foust, the dates were inserted by Jones and the documents mailed to Foust.

At the same time a claim for grievances was sent to Mr. Jones for his signature to be mailed to the carrier, thus initiating the grievance procedure (Ex. 29, p. 13a infra). That letter, typed in Omaha, dated and signed in Rawlins, Wyoming, and sent back to Omaha was mailed two days too late (taking the date most favorable to the union. But see pp. 11a-12a infra).

The union had not processed Mr. Foust's prior grievances and did not process the grievance related to this charge (Ex. 28).

In Petitioner's Brief, it is suggested by footnote that the statement "it is not surprising that this claim was denied because of its not having been timely filed" made by the court below was an improper characterization of the facts. It is, however, a fair statement based upon all of the evidence that there can be no claim of surprise that the claim made by the union on behalf of Foust was denied based upon timeliness. This is particularly so in light of the testimony read from the Deposition of Mr. Wisniski at the trial wherein it was stated that it was perfectly appropriate to ask for an

extension of time in which to file a grievance but that was never done in Mr. Foust's case. (Ex. 25).

With these additions, Respondent accepts Petitioner's statement of fact.

ARGUMENT

I.

UNDER THE CIRCUMSTANCES OF THIS CASE PUNITIVE DAMAGES ARE THE PROPER REMEDY FOR A BREACH OF THE DUTY OF FAIR REPRESENTATION IMPOSED UPON A COLLECTIVE BARGAINING AGENT UNDER THE RAILWAY LABOR ACT.

At the outset of this presentation it must be kept in mind that the duties of a certified collective bargaining agent are two-fold and run in different directions.

The first duty of a collective bargaining agent, and the one which was of paramount importance to Congress in the adoption of the Railway Labor Act, was the duty to negotiate with employers working conditions, rates of pay, hours and the like on behalf of employees. The legislative history of a similar act relating to employees other than Railway employees makes this clear, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 485 (1957).

The relationship between the employer and the collective bargaining agent was mechanically dealt with before the National Labor Relations Board which was set up as the enforcement agency of the Government to carry out the policy established by Congress.

The second duty of the collective bargaining agent, which runs opposite from the first, is a duty to the members of the collective bargaining unit to represent them fairly in its dealings with them either individually or collectively. This duty although not clearly spelled out in the statute has been imposed upon the collective bargaining agent by the courts,

Elgin, Joliet and Eastern Railway Company v. Burley, 325 U.S. 711 (1944). *Steele v. Louisville and Nashville Railroad Company*, 323 U.S. 192 (1944); *Humphrey v. Moore*, 375 U.S. 335 (1964); *Conley v. Gibson*, 355 U.S. 41 (1957).

This court pointed out the absence of statutory direction imposing the duty of fair representation in *Elgin, Joliet and Eastern Railroad Company v. Burley*, *supra*.

"Whether or not the agent's exclusive power extends also to the settlement of grievances, in conference or in proceedings before the Board, presents more difficult questions. The statute does not expressly so declare. Nor does it explicitly exclude these functions. The questions therefore are to be determined by implication from the pertinent provisions." 325 U.S. 729.

It was stated that the duty must be implied from the statute:

"But we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority... The use of the word "representative," as thus defined and in all the contexts in which it is found, plainly implies that the representative is to act on behalf of all the employees which, by virtue of the statute, it undertakes to represent." *Steele v. Louisville and Nashville Railroad Company*, *supra* at 199.

"Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in

carrying out these functions than it can in negotiating a collective agreement." [Footnote omitted] *Conley v. Gibson*, *supra* at 46.

Although petitioner's brief tends to confuse these two duties they cannot be intermingled in this case. The differences between the two duties are as significant as the differences between day and night. Vigilance is required to insure that the real issue does not become lost when examining the rights and remedies available to respondent, an individual member of the collective bargaining unit.

The duty itself has been spelled out in a number of contexts. One of the more common definitions is found in *Vaca v. Sipes*, 386 U.S. 171 (1967):

"A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U.S. 190.

In *Ruzicka v. General Motors Corporation*, 523 F.2d 306 (6th Cir. 1975) the duty was defined as follows:

"We agree with the Fourth Circuit's analysis of the three-pronged standard established in *Vaca* for determining whether a union has unfairly represented one of its members:

A union must conform its behavior to each of these three separate standards. First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis

for civil action. *Griffin v. International United Automobile Workers*, 469 F.2d 181, 183 (4th Cir. 1974). See also *De Arroyo v. Sindicato De Trabajadores Packinghouse*, AFL CIO, 452 F.2d 281 (1st Cir.) cert. denied, 400 U.S. 877, 91 S.Ct. 117, 27 L.Ed.2d 114 (1970). We believe that the District Court misread *Vaca* when it held that 'bad faith' must be read into the separate and independent standards of 'arbitrary' or 'discriminatory' treatment. Union action which is arbitrary or discriminatory need not be motivated by bad faith to amount to unfair representation." 523 F.2d 309-310. [Footnote omitted]

and it was further stated:

"... when a union makes no decision as to the merit of an individual's grievance but merely allows it to expire by negligently failing to take a basic and required step towards resolving it, the union has acted arbitrarily and is liable for a breach of its duty of fair representation." 523 F.2d 310.

Indeed, the court below adopted the definition from *Hines v. Anchor Motor Freight Inc.*, 424 U.S. 554 (1976); *Foust v. International Brotherhood of Electrical Workers*, 572 F.2d 710, 715 (10th Cir. 1978). The denial of certiorari on that issue concludes any debate as to the definition of the duty and its breach in the instant case.

The question left to be resolved then is one of appropriate remedy, a question petitioner states has not yet been resolved.

The law to be applied is Federal law, *Textile Workers Union v. Lincoln Mills*, supra, 456.

"We conclude that the substantive law to apply in suits under §301 (a) is federal law which the courts must fashion from the policy of our national labor laws."

See also *Humphrey v. Moore*, supra., 343-344.

The trial courts are left to fashion an appropriate remedy. The remedies may be either equitable or legal in nature, and "[t]he range of judicial inventiveness will be determined by the nature of the problem." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957).

Each case comes before the courts under various names and catch-phrases, based upon the facts of each case. In *Morrissey v. National Maritime Union of America*, 544 F.2d 19 (2nd Cir. 1976), Defendant union had Plaintiff arrested for his exercise of his right of freedom of speech in the union hall. Plaintiff brought his cause of action under the Landrum-Griffith Act, 29 U.S.C. 411(a)(2) and (5) and included a state claim for malicious prosecution under New York law. The jury awarded Plaintiff a "modest award of compensatory damages and a large award of punitive damages against the union...". The trial judge eliminated the punitive damages award against the union. The court of appeals disagreed with that holding and reinstated the punitive damages judgment, citing *International Brotherhood of Boilermakers v. Braswell* 388 F.2d 193 (5th Cir. 1968), and took the position that a union could be liable for punitive damages under the Landrum-Griffith Act.

In *Harrison v. United Transportation Union*, 530 F.2d 558 (4th Cir. 1976), cert. denied 425 U.S. 958 (1976), a conductor sued his railroad employer and the union. Judgment was entered against the union for One Thousand Five Hundred Seventy Dollars (\$1,570.00) in consequential damages and Six Thousand Dollars (\$6,000.00) in punitive damages.

The Court found:

"UTU, however, could be found to have breached its duty to Harrison. A union must serve the interests of all members without hostility, discrimination, arbitrariness or capriciousness toward any. Although a union may exercise discretion in

representing employees, it must act with complete good faith and honesty. This is settled law. *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed. 2d 842 (1967); *Griffin v. International Union, UAW*, 469 F.2d 181, 182-83 (4 Cir. 1972). See also *Czosck v. O'Mara*, 397 U.S. 25, 90 S.Ct. 770, 25 L.Ed.2d 21 (1970); *Woods v. North American Rockwell Corp.*, 480 F.2d 644 (10 Cir. 1973); *Lewis v. Magna American Corp.*, 472 F.2d 560 (6 Cir. 1972); *Turner v. Air Transport Dispatchers' Association*, 468 F.2d 297 (5 Cir. 1972); *Encina v. Tony Lama Boot Co.*, 448 F.2d 1264 (5 Cir. 1971).

The Court went on to say:

"Unless punitive damages are available, an employee may lack the strong legal remedy necessary to protect his right against a union which has either maliciously or in utter disregard of his rights denied him fair representation Again analogizing the union's duty of fair representation to a constitutional duty, we hold that in the instant case proof of personal animosity or actual malice was not necessary. In telling the jury that it might award punitive damages if it found that UTU acted wantonly or maliciously or that it acted recklessly or in callous disregard of Harrison's rights, or that Harrison's rights were disregarded with unnecessary harshness or severity, the trial court gave unexceptional instructions. Therefore, recovery of punitive damages is sustained." *Harrison v. United Transportation Union*, supra 563, 64.

The judicial inventiveness of remedies set forth is as varied as the cases coming before the court, *Bond v. Local Union 823, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, 521 F.2d 5 (8th Cir. 1975) (Damages for breach of contract); *Emmanuel v. Omaha Carpenters District Council*, 560 F.2d 382 (8th cir. 1977) (Awarding attorney's fees); *Butler v. Local Union 823, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 514 F.2d

442, (8th Cir. 1975) (Awarding equitable relief); *Williams v. Pacific Maritime Association* 421 F.2d 1287 (9th Cir. 1970) (Tailoring a complaint on an interlocutory appeal); *Brady v. Trans World Airlines Inc.*, 196 F. Supp. 504 (D. Del. 1961) (Reinstatement and damages, equitable relief); *Crawford v. Pittsburg-Des Moines Steel Co.*, 386 F. Supp. 290 (D. Wyo. 1974) (Breach of Contract); *Tippett v. Liggett and Myers Tobacco Company*, 316 F. Supp. 292 (M.D. N.C. 1970) (Damages and punitive damages); *Sidney Wanzer and Sons Inc. v. Milk Drivers Union Local 753, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 249 F. Supp. 664 (N.D. Ill. 1966) (Specific performance, damages and punitive damages); *Patrick v. I.D. Packing Company*, 308 F. Supp. 821 (S.D. Ia. 1969) (Exemplary damages).

That the courts take the mandate of *Lincoln Mills* seriously can be seen in the following quote from *Tippett v. Liggett and Myers Tobacco Company*, supra,

"Courts have generally held that punitive damages are not recoverable in § 301 actions. While § 301 suits are in the nature of contract, unfair representation suits are in the nature of tort. Elements necessary to prove unfair representation — subjective bad faith or arbitrary conduct — are elements normally considered when punitive damages are awarded in the ordinary tort action. Since bad faith and arbitrariness exist in varying degrees, it is conceivable that in cases of extreme conduct punitive damages should be considered in fashioning an appropriate remedy." 316 F. Supp. 292, 298.

We have the created statutory tort implied from the Railway Labor Act, and we have, then, the remedies to be applied to that tort labeled by this court as the breach of duty of fair representation. The traditional tort remedies have stood the judicial system in good stead and punitive damages has always been one method by which the policy of the law is carried out. Its influence can be startling, *Prosser, Handbook on the Law of Torts*, 4th Ed., P. 11.

In a recent case before this court the traditional tort remedy of punitive damages was again affirmed in the context of a union member bringing an action against his union, *Farmer v. United Brotherhood of Carpenters and Joiners of America Local 25*, 430 U.S. 290 (1977). In *Farmer*, however, the action was brought in California on the state cause of action for outrageous conduct for the intentional infliction of harm. The action was also couched in terms of breach of contract.

The jury had awarded a verdict of Seven Thousand Five Hundred Dollars (\$7,500.00) actual damages and One Hundred Seventy-five Thousand Dollars (\$175,000.00) punitive damages. Judgment was entered on the verdict.

It was stated in *Farmer*, relying on *Vaca v. Sipes*:

"... our cases 'demonstrate that the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies'" [Footnote omitted] 430 U.S. at 300-301.

Again there was a recognition of the mandate of *Lincoln Mills* to fashion an appropriate remedy.

The same approach was taken by this court in *United Construction Workers v. Laburnum Construction Corporation*, 347 U.S. 656, where it was stated:

"To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. 347 U.S. 665.

It was also stated that the position petitioner takes, failure to mention punitive damages by Congress in adoption of

the Railway Labor Act may be construed as a denial of such damages, is simply untenable.

"On the other hand, it is not consistent to say that Congress, in that section, authorizes court action for the recovery of damages caused by tortious conduct related to secondary boycotts and yet without express mention of it, Congress abolishes all common law rights to recover damages caused more directly and flagrantly through such conduct as is before us.

Considerable legislative history supports this interpretation. Under the National Labor Relations Act, 1935, there were no prohibitions of unfair labor practices on the part of labor organizations. Yet there is no doubt that if agents of such organizations at that time had damaged property through their tortious conduct, the persons responsible would have been liable to a tort action in state courts for the damage done. See *Allen-Bradley Local, etc. v. Wisconsin Employment Relations Board*, 315 U.S. 740, 86 L.Ed 1154, 62 S.Ct. 820." [Footnote omitted] 347 U.S. 666.

A similar result obtained in *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America v. Russell*, 356 U.S. 634 (1958), a case arising in Alabama where Plaintiff was awarded Fifty Thousand Dollars (\$50,000.00) in punitive damages. Indeed, the court in *Russell* quoted from *Laburnum* the language set forth above.

The rationale behind the award of punitive damages was clearly set out:

"If employee's common law rights of action against a union tortfeasor are to be cut off, that would in effect grant to unions a substantial immunity from the consequences [of its acts]." 356 U.S. 645.

While both *Russell* and *Laburnum* arise in the context of state court actions raising issues of state law, such actions are

founded on efforts to further nation labor policy in relationships between bargaining agents and members of the bargaining unit. It would be awkward at best to reach the conclusion that the federal law to be applied as required by *Textile Workers Union v. Lincoln Mills*, *supra*, depends upon the state law of the state in which the breach of duty occurs.

If unions are not exempt from punitive damages for their tortious conduct in appropriate cases, then petitioner's argument that the award in the instant case violates a national labor policy that protects unions from such awards is clearly without merit.

It is suggested by petitioner that *Deboles v. Trans World Airlines Inc.*, 552 F.2d 1005 (3rd Cir. 1977) stands for the proposition that punitive damages may never be granted. Only a brief review of that case is necessary to establish that the language relied upon by petitioner is *dicta*. It was stated clearly by the *Deboles* Court that punitive damages was not an issue there:

"We need not decide whether any circumstances exist in which a punitive-type remedy on behalf of employees against a union for union misconduct might be implied under the Railway Labor Act. In the absence of actual injury occasioned by the union's wrongful misstatements, imposing liability in the instant case would be punitive and discordant with the limited remedies available under the Act." 552 F.2d 1019.

Other cases cited by petitioner and relied upon for the proposition that punitive damages may not be awarded against a union arise in the context of an over extension of authority by the National Labor Relations Board, whose duties and powers are spelled out by statute.

It is true that *Republic Steel Corporation v. Labor Board*, 311 U.S. 7 (1940) prohibits the National Labor Relations Board from exceeding its authority and imposing a punishment against the union. The act is clear that such

government activity is barred. No such limitation exists upon the essentially private relationship between the bargaining agent and the member of the bargaining unit. The same can be said of *Local 57, International Ladies Garment Workers Union v. N.L.R.B.*, 374 F.2d 295, (D.C. Cir. 1967) cert. denied 387 U.S. 942 (Government v. Union); *Local 127, United Shoe Workers v. Brooks Shoe MFG Co.*, 298 F.2d 277 (1962) (Union v. Employer under § 303 L.M.R.A.); *Williams v. Pacific Maritime Association*, 421 F.2d 1287 (9th Cir. 1970) (Member v. Member).

The trial court is criticized in Petitioner's Brief for failure to follow the decision of *Crawford v. Pittsburgh-Des Moines Steel Co.*, 386 F. Supp. 290 (D. Wyo. 1974). The trial court obviously considered *Crawford* and found it wanting in its relationship to the instant case (A. 13). The court of appeals considered this issue and reached a different conclusion than petitioner.

"in our opinion the evidence adduced as to the perfunctory manner of handling the claim was sufficient justification for the submission of the issue of breach of duty to the jury. The Union filed the grievance out of time and it was due to this that the Board denied it. The evidence, in addition to that just mentioned, showed that there had been an earlier effort on the part of Foust to file a claim for wages while he was attending physical therapy sessions. The Union apparently believed that this was cognizable under the Federal Employees' Liability Act, but made little effort to clarify the matter. This serves to give character to the subsequent failure of the Union to pursue the claim in question despite the fact that it had full knowledge of the 60-day limit. At no time did Jones or Wisniski seek to contact Foust by telephone. Instead, despite the shortness of time, they insisted that Foust personally submit the claim to them. This message was contained in a letter prepared in Omaha, mailed to Rawlins and then mailed to Foust the day after the time for submitting a claim had passed. None of

this was necessary. Ordinarily Jones would have been the person to handle a grievance, but Wisniski became a part of the machinery that was used and this delayed the ultimate filing. The jury could consider this as arbitrary, unreasonable and a breach of duty." *Foust v. International Brotherhood of Electrical Workers*, 572 F.2d 710, 716, (10th Cir. 1978).

Petitioner would have this court undertake a massive rewriting of the statutory scheme of national labor policy as is set forth in the National Labor Relations Act and the Railway Labor Act in order to provide labor unions a protection that Congress never intended, one which ill serves the national labor policy expounded by those acts. In urging this court to do so, petitioner cites copyright, patent, antitrust, civil rights acts, the omnibus crime control act, the Bank Holding company act amendment of 1970, the equal credit opportunity act and the Truth in Lending Act (see Petitioner's Brief, pp. 35-39).

In each of those situations Congress set forth in clear and unequivocal language the remedies that it intended to be imposed. To suggest then that congressional intent is evident only by its absence is to ignore the obvious. If Congress meant to exclude punitive damages, Congress would have said so. See the Appendix to *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

Petitioner suggests that if punitive damages are allowed against labor unions then a veritable Pandora's box of vexatious and non-meritorious litigation will result, leaving the union open to blackmail by undeserving plaintiffs. This distrust of the judicial system is not only unwarranted but unwise. The union's best protection according to its own brief is the judicial system it so cavalierly maligns. Respondent has little doubt that non-meritorious, vexatious litigation will be given short shrift in the courts of this nation, and rightfully so. Such an unsupported claim amounts to little more than fearful reaction of any miscreant to the proper application of a little well deserved discipline.

II.

PUNITIVE DAMAGES WERE PROPERLY AWARDED ON THIS RECORD

Petitioner insists now as he has insisted before the jury, the trial court and the court of appeals, that the evidence does not warrant the jury's verdict awarding respondent punitive damages. Petitioner has yet to find anyone in agreement.

The careful selection of fact, ignoring the real relationship between the petitioner and respondent in the instant case, is clear from an evaluation of Petitioner's Brief.

Petitioner, therefore, invites this court to substitute its judgment for that of the jury and the courts before it based on the facts carefully selected by Petitioner, as opposed to the whole of the case.

The test of punitive damages was stated in the court below:

"We are not convinced that actual animosity or express malice or premeditated malice are essential to the award of punitive damages. Wanton conduct or reckless disregard for the rights of the employee should suffice. We approve, therefore, of the submission by the court of the issue of exemplary damages to the jury, and we find no fault in the trial court's instruction." *Foust v. International Brotherhood of Electrical Workers*, 572 F.2d 710, 719 (10th Cir. 1978).

Petitioner admits in its brief that the issue was not properly preserved below and should not now be considered, and no claim is made that plain error was committed. (Petitioner's Brief, p. 46).

The trial court's instruction on punitive damages was a correct statement of the law:

"You are further instructed that the Plaintiff must show more than that the Union did not press

his grievance. You must find by a preponderance of the evidence that the Union in failing to process the grievance acted arbitrarily, capriciously or in bad faith. However, you are also instructed that a Union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory manner.

You are instructed that the term "arbitrary and capricious" are synonymous and refer to an act done without an adequate principle or an act not done according to reason and judgment. Whether an act is arbitrary or capricious must be judged on the basis of whether the act complained of is reasonable or unreasonable under the circumstances.

You are instructed that the term "bad faith" implies a breach of faith or a willful failure to respond to plain and well understood obligations.

If you find that the Defendant failed to perform a duty owed to the Plaintiff, then you must determine the amount of damages sustained by the Plaintiff as a result of that breach of duty. The measure of damages to be considered by you includes all of the salary and wages, overtime pay, vacation pay, insurance, seniority and fringe benefits which the Plaintiff would have received during the period he would have been working for the railroad company.

In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrong doer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If the jury should find from a preponderance of the evidence in the case that the Plaintiff is entitled to a verdict for actual or compensatory damages; and should further find that the act or

omission of the Defendants, which proximately caused actual injury or damage to the Plaintiff, was maliciously, or wantonly, or oppressively done; then the jury may, if in the exercise of discretion they unanimously choose so to do, add to the award of actual damages such amount as the jury shall unanimously agree to be proper, as punitive and exemplary damages.

Now, an act or failure to act is "maliciously" done, if prompted or accompanied by ill will, or spite, or grudge, either toward the injured person individually, or toward all persons in one or more groups or categories of which the injured person is a member.

An act or a failure to act is "wantonly" done, if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

An act or a failure to act is "oppressively" done, if done in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness, or disability, or misfortune of another person.

Whether or not to make any award of punitive and exemplary damages, in addition to actual damages, is a matter exclusively within the province of the jury, if the jury should unanimously find, from a preponderance of the evidence in the case, that the Defendants' act or omission, which proximately caused actual damage to the Plaintiff, was maliciously or wantonly or oppressively done; but the jury should always bear in mind that such extraordinary damages may be allowed only if the jury should first unanimously award the Plaintiff a verdict for actual or compensatory damages; and the

jury should also bear in mind, not only the conditions under which, and the purpose for which, the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any part to the case." (Trial Transcript, Vol. II, pp. 264-266).

This statement of the law is essentially the same as that used in *International Union United Auto, Aircraft and Agricultural Implement Workers of America v. Russell*, 356 U.S. 634 (1958). See also *Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967); *Barry v. Edmonds*, 116 U.S. 550 (1886); *Lakeshore and Michigan Southern Railway Company v. Prentice*, 147 U.S. 181 (1893); *Scott v. Donald*, 165 U.S. 58 (1897); *Nader v. Allegheny Airlines Inc.*, 512 F.2d 527 (D.C. 1975); *Basista v. Weir*, 340 F.2d 74 (3rd Cir. 1965); *Bond v. Local Union 823 International Brotherhood of Teamsters, Chauffeurs and Helpers of America*, 521 F.2d 5 (8th Cir. 1975); *Harrison v. United Transportation Union*, 530 F.2d 558 (4th Cir. 1976); *Woods v. Local Union No. 613 of International Brotherhood of Electrical Workers*, 404 F. Supp. 110 (N.D. Ga. 1975); *Sidney Wanzer and Sons Inc. v. Milk Drivers Union Local 753 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 249 F. Supp. 664 (N.D. Ill. 1966); *Tippett v. Liggett and Myers Tobacco Co.*, 316 F. Supp. 292 (M.D. N.C. 1970).

The test set forth in *Woods v. Local Union No. 613 of the International Brotherhood of Electrical Workers*, *supra*., is appropriate here:

" . . . the better rule is to allow recovery of punitive damages under the LMRDA if the union acts with actual malice or reckless or wanton indifference to a member's rights. *International Brotherhood of Boilermakers, etc. v. Braswell*, 388 F.2d

193 (5 Cir.) cert. denied, 391 U.S. 935, 88 S.Ct. 1848, 20 L.Ed.2d 854 (1968). The Fifth Circuit stated that the purpose of the LMRDA is to "eliminate or prevent improper practices on the part of labor organizations," . . . 29 U.S.C. §401. The awarding of punitive damages in appropriate cases serves as a deterrent to those abuses which Congress sought to prevent . . . As in all remedial legislation, LMRDA should be liberally construed to effectuate its purposes." 404 F. Supp. 118.

A statement from *Tippett v. Liggett and Myers Tobacco Company*, *supra*., is also apropos of the case at bar:

"Courts have generally held that punitive damages are not recoverable in § 301 actions. While § 301 suits are in the nature of contract, unfair representation suits are in the nature of tort. Elements necessary to prove unfair representation — subjective bad faith or arbitrary conduct — are elements normally considered when punitive damages are awarded in the ordinary tort action. Since bad faith and arbitrariness exist in varying degrees, it is conceivable that in cases of extreme conduct punitive damages should be considered in fashioning an appropriate remedy." 316 F. Supp. 298.

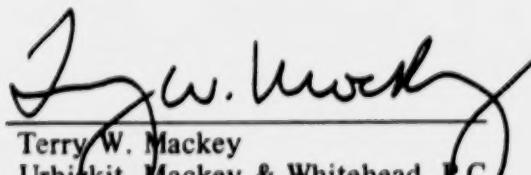
The facts of this case display a reckless disregard for the rights of petitioner, "a wanton indifference" a "disdain" to the members of petitioner's union and their rights under the collective bargaining agreement negotiated by petitioner. The Court below clearly pointed this out, *Foust v. International Brotherhood of Electrical Workers*, *supra*. 716. The trial court gave appropriate instruction, and based upon the evidence, the jury was entitled to find that the union had acted in such a callous manner as to support an award of punitive damages under that instruction. This court should not now substitute its judgment for the jury who heard the evidence.

CONCLUSION

To borrow a phrase from petitioner's Brief "punitive damages . . . are strong medicine". Strong medicine is required to cure social ills before they reach epidemic proportions. Punitive damages have always been available to protect the rights of private citizens in their relationship with others.

A good dose of punitive damages, not unlike a good dose of castor oil, will stand as a constant reminder for the petitioner and others so situated to take care of their own body. Without strong medicine the ills manifested by petitioner in this case may become fatal.

Respectfully submitted



Terry W. Mackey
Urbigkit, Mackey & Whitehead, P.C.
The Mall, Suite One
1651 Carey Avenue
P. O. Box 247
Cheyenne, WY 82001

Attorneys for Respondent

CERTIFICATE OF SERVICE

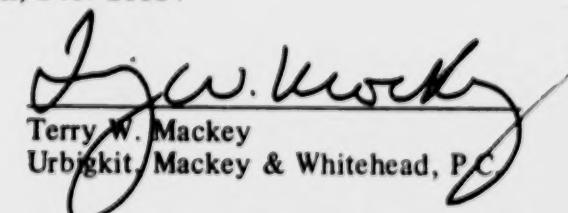
Terry W. Mackey, of Urbigkit, Mackey & Whitehead, P.C., hereby certifies that on the 2nd day of January, 1979, he served a true and correct copy of the foregoing Brief for Respondent by mailing copies thereof and depositing same in the United States Post Office at Cheyenne, Wyoming, postage prepaid, to:

William J. Hickey and
Edward J. Hickey, Jr.
Mulholland, Hickey, Lyman,
McCormick, Fisher & Hickey
1125 Fifteenth Street, N.W.
Suite 400
Washington, D.C. 20005

Laurence J. Cohen
Sherman, Dunn, Cohen & Leifer
1125 Fifteenth Street, N.W.
Washington, D.C. 20005

Laurence Gold
815 Sixteenth Street, N.W.
Washington, D.C. 20005

George Kaufmann
2101 L Street, N.W.
Washington, D.C. 20037



Terry W. Mackey
Urbigkit, Mackey & Whitehead, P.C.

APPENDIX

February 5, 1971

Mr. D. F. Jones
District Chairman
514 12th Street
Rawlins, Wyoming 82301

Dear Brother Jones:

Enclosed copy of letter received from Mr. C. O. Jett,
Superintendent Communications to L. D. Foust, Radioman,
Cheyenne, Wyoming concerning proper leave of absence.

Please furnish all the necessary information available to
you in connection with the Carriers statement that Mr. Foust
did not comply with the rules governing proper leave of
absence.

With best wishes, I am

Fraternally Yours,

Leo Wisniski

PLAINTIFF'S
EXHIBIT 7

No. C-74-50-Civil
Defendants' Exhibit 6

RAWLINS WYO
FEB. 9, 71

LEO WISNISKI
GENERAL CHAIRMAN IBEW
5836 SPRING ST.
OMAHA NEBR. 68106

ENCLOSED IS ALL CORRESPONDENCE REFERENCE
TO MR. FOUST I ALL SO HAVE PHOTO COPYS OF IT
ALL IF YOU HAVE ANY QUESTIONS ABOUT.

AS FOR LEAVE OF ABSENCE FOR MR. FOUST THE
LAST LEAVE OF ABSENCE THAT I RECEIVED WAS FOR
90 DAYS FROM SEPT. 23, 70 THRU DEC. 22, 70 WHICH
CAME TO ME WHILE I WAS ON VACATION AND I
SIGNED IT WHEN I RETURNED FROM VACATION AND
FORWARDED IT TO MR. JETT AND RETAIN ONE COPY
FOR MY FILE WHICH I AM INCLOSING.

YOURS, D.F.JONES

PLAINTIFF'S
EXHIBIT 8

BEST COPY AVAILABLE

UNION PACIFIC RAILROAD COMPANY		REQUEST FOR LEAVE OF ABSENCE	
Employee Name	Employee No.	From Date	To Date
John D. Jones	123456789	1970-09-23	1970-12-22
Reason for leave		Location	
for the following reason		Date	
I intend the services of my employee		1970-09-23	
My Group Life Insurance should be		Last leave	
(Continue on reverse)		days to	
I understand that insurance will be canceled if premium contributions		1970-12-22	
are not paid on or before the tenth day of the first month following that to which they apply. I further understand that if my employment is terminated, my insurance will be canceled as of the date of termination, and as a consequence premium contributions will be subject to collection by the insurance company. I understand that if my employment is terminated, my leave of absence and all employment rights with the Union Pacific Railroad Company shall be automatically terminated.			
My intended leave will be			
Actual hours		Total Number of Hours	
Comments or Reasons		Signature	
I HEREBY CERTIFY THAT THE PERSONNEL WORKING PRESENTLY APPROVED WITH CONSISTENTLY A LEAVE OF ABSENCE FOR THE PERIOD STATED ABOVE.		Signature	
Person certifying		Date	
I HEREBY CERTIFY THAT THE FOREGOING REQUEST FOR LEAVE OF ABSENCE HAS BEEN PROPERLY APPROVED AND THE ORIGINAL HAS BEEN		Date	
CERTIFIED TO		RECEIVED	
Person Requesting Leave		Date	
This _____ day of _____		19_____	

Hand of Department or Person certifying _____
Hand of Requesting Person _____

March 26, 1971

Mr. D. F. Jones
514 - 12 Street
Rawlins, Wyoming 32301

RE: L. D. Foust—Radioman L.U. no. 775,
Sen. Date 5-14-62 — Social Security No. 508-32-2651

Dear Mr. Jones:

We have been informed that you are the officer of the carrier authorized to receive grievances under Rule 21 of the agreement between the Union Pacific Railroad and System Federation No. 105, International Brotherhood of Electrical Workers, dated April 1, 1957. If you are not the officer so authorized under Rule 21 would you please, in your official capacity as union representative of Mr. Foust, please inform us by return mail who is the officer of the carrier authorized to receive grievances and also, please forward on to him this written grievance claim which we are submitting pursuant to Rule 21.

On February 5, 1971, Mr. L. D. Foust received a letter from Mr. C. O. Jett, a carbon of which was sent to Mr. Leo Wisniski, General Chairman of the I.B.E.W., which terminated Mr. Foust's services with the Union Pacific Railroad. A copy of this letter is attached. It is Mr. Foust's contention that his termination was in clear violation of the agreement between the Union Pacific Railroad and the International Brotherhood of Electrical Workers. Mr. Foust has complied with Rule 25 of said agreement which deals with personal injury. He has filed all papers requested of him by the Union Pacific Railroad. His doctor, Doctor Taylor, has kept the Union Pacific informed as to Mr. Foust's medical progress. Dr. Taylor is a Union Pacific doctor.

PLAINTIFF'S
EXHIBIT 9

Mr. D. F. Jones
March 26, 1971
Page 2

RE: L. D. Foust

Pursuant to Rule 21 Mr. Foust is making this written report of his grievance claim and hereby requesting the International Brotherhood of Electrical Workers to do everything within their power to enable Mr. Foust to be re-enstated as an employee of the Union Pacific Railroad without any loss of wages or loss of seniority. The action of Mr. C. O. Jett was completely arbitrary and capricious, without proper foundation. We will be more than happy to supply you with any and all information we have concerning this incident to assist you in the investigation of this matter.

A carbon of this letter is being sent to Mr. Wisniski and to the President of the International Brotherhood of Electrical Workers to insure that proper notification is given to the union pursuant to Rule 21 and also enter an attempt to help to expedite this matter.

As you are well aware, Mr. Foust filed another claim with you on June 17, 1970 in regards to a union agreement violation that came to his knowledge in late May, 1970. According to Rule 21, paragraph one, all claims not disallowed within 60 days are to be deemed allowed. Mr. Foust to this date has never received any correspondence from you in regards to this claim that he filed on June 17, 1970. You informed him in December by telephone that the union was not going to do anything in regards to his claim due to the fact that he had retained our law firm to assist him in his personal injury claim against the Union Pacific Railroad. For your knowledge and for the knowledge of Mr. Wisniski, who I understand gave you this information to convey to Mr. Foust, Mr. Foust did not retain our firm until late November, 1970, long after the 60 day claim period had expired. We would appreciate some acknowledgment of this claim we are here-with mailing and appreciate any and all support the union can give Mr. Foust in regards to this matter. As I indicated to you in our letter of January 21, 1971, Mr. Foust is presently and has always been a strong union man. He looks towards the

union for security and backing but is becoming very disheartened by the unions lack of cooperation.

If I can assist you in any way or if you require any information from Mr. Foust in regards to this claim, please let me know at your early convenience.

Very truly yours,

Edward P. Moriarity

EPM:pa

cc: Leo Wisniski
cc: Mr. Pillard

STICK POSTAGE STAMPS TO ARTICLE TO COVER POSTAGE (FIRST CLASS OR AIRMAIL), CERTIFIED MAIL FEE, AND CHARGES FOR ANY SELECTED OPTIONAL SERVICES. (see front)

1. If you want the receipt postmarked, stick the gummed stub on the left portion of the address side of the article, leaving the receipt attached, and present the article at a post office service window or hand it to your mail carrier. (no extra charge)
2. If you do not want this receipt postmarked, stick the gummed stub on the left portion of the address side of the article, detach and retain the receipt, and mail the article.
3. If you want a return receipt, write the certified mail number and your name and address on a return receipt card, Form 3811, and attach it to the back of the article by means of the gummed stubs. Endorse front of article RETURN RECEIPT REQUESTED.
4. If you want the article delivered only to the addressee, endorse it on the front DELIVER TO ADDRESSEE ONLY. Place the same endorsement in line 2 of the return receipt card if that service is requested.
5. Save this receipt and present it if you make inquiry.

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S). REQUIRED FEE(S) PAID.	
<input type="checkbox"/> Show to whom, date and address where delivered	<input type="checkbox"/> Deliver ONLY to addressee

RECEIPT Received the numbered article described below.	
REGISTERED NO.	SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)
CERTIFIED NO. 288377	SIGNATURE OF ADDRESSEE'S AGENT, IF ANY MAR. 1977
INSURED NO.	
DATE DELIVERED 3/27/77	SHOW WHERE DELIVERED (only if requested) Newark, NJ
655-16-7150 (412) 218-6900 (412) 218-6900 (412) 218-6900	

BEST COPY AVAILABLE

Rawlins, Wyoming
April 5, 1971

Mr. L. D. Foust
1502 Adams Avenue
Cheyenne, Wyoming 82001

Dear Mr. Foust:

This with reference to letter of March 26, 1971 received from Attorney Edward P. Moriarity relative to grievance in your behalf.

It is proper procedure for the employee to make his claim or grievance known in writing to the District Chairman for consideration for handling with the Carrier in accordance with provisions of the Agreement. As you are very well aware, Rule 21 provides that all claims or grievances must be presented in writing by or on behalf of the employee involved, that is why it is necessary to receive in writing authority to handle claims or grievances for further handling.

Upon receipt of your grievance in writing, and request to the undersigned to handle your initial claim pertaining to the Carrier terminating your service, it will be reviewed and handled under the proper grievance procedures of the current Agreement.

Yours truly,

D. F. Jones
District Chairman
D. F. Jones

PLAINTIFF'S
EXHIBIT 10

No. C-74-50 Civil
Defendants' Exhibit 8

Rawlins, Wyoming

Mr. L. D. Foust
1502 Adams Avenue
Cheyenne, Wyoming 82001

Dear Mr. Foust:

This with reference to letter of March 26, 1971 received from Attorney Edward P. Moriarity relative to grievance in your behalf.

It is proper procedure for the employee to make his claim or grievance known in writing to the District Chairman for consideration for handling with the Carrier in accordance with provisions of the Agreement. As you are very well aware, Rule 21 provides that all claims or grievances must be presented in writing by or on behalf of the employee involved, that is why it is necessary to receive in writing authority to handle claims or grievances for further handling.

Upon receipt of your grievance in writing, and request to the undersigned to handle your initial claim pertaining to the Carrier terminating your service, it will be reviewed and handled under the proper grievance procedures of the current Agreement.

Yours truly,

D. F. Jones
District Chairman

U.S. District Court (Wyoming)
Def. Exhibit H
Doc. No. _____

PLAINTIFF'S
EXHIBIT 10(a)

10a

APRIL 6, 71
RAWLINS, WYO.

L. D. FOUST
1502 ADAMS AVE.
CHEYENNE WYO.

REFERENCE TO THE LETTER RECIEVED FROM
YOUR ATTORNEYS. I HAVE FILED YOUR CLAIM WITH
THE PROPER AUTHORITES UNDER THE EXISTING
AGREEMENT AND AS YET HAVE NOT RECIEVED AND
ANSWER.

D. F. JONES
D. F. Jones
DISTRICT CHAIRMAN

11a

Rawlins, Wyoming
April 6, 1971

Mr. H. M. Robertson
Asst. to the Supt. Comms.
Omaha, Nebraska

Dear Sir:

I hereby submit claim in favor of Mr. L. D. Foust, Radioman, Cheyenne, Wyoming who was unjustly dismissed from service account failing to renew medical leave of absence.

The Union Pacific Railroad Company is in violation of the Agreement for terminating Mr. Foust's service, due to the fact they are directly liable for his on duty injury, therefore, I request he be reinstated to service, compensated for all time lost, inimpaired seniority, vacation rights, and all benefits due under current agreements.

Very truly yours,

D. F. Jones

D. F. Jones
District Chairman

PLAINTIFF'S
EXHIBIT 11

C.O.J.
APR 12 1971

H.M.R.
APR 13 1971

Carrier's Exhibit "D"

PLAINTIFF'S
EXHIBIT 12

12a

Rawlins, Wyoming
April 8, 1971

Mr. H. M. Robertson
Asst. to the Supt. Comms.
Omaha, Nebraska

Dear Sir:

I hereby submit claim in favor of Mr. L. D. Foust, Radioman, Cheyenne, Wyoming who was unjustly dismissed from service account failing to renew medical leave of absence.

The Union Pacific Railroad Company is in violation of the Agreement for terminating Mr. Foust's service, due to the fact they are directly liable for his on duty injury, therefore, I request he be reinstated to service, compensated for all time lost, inimpaired seniority, vacation rights, and all benefits due under current agreements.

Very truly yours,

D. F. Jones
D. F. Jones
District Chairman

EXHIBIT NO. 13

13a

April 6, 1971

Mr. D. F. Jones
District Chairman
514 12th Street
Rawlins, Wyoming 82301

Dear Brother Jones:

Enclosed copy of letter for date and your signature to be sent to L. D. Foust, with copy to his Attorney and copy for your file as suggested by the International Office.

Upon receipt of your answer to L. D. Foust claim filed with Mr. H. M. Robertson, sent copy of his reply to this office immediately. You will be advised as to an answer to Foust. It imperative you comply with these instructions so as to keep you clear of any legal action that may arise.

With best wishes, I am

Fraternally yours,

Leo Wisniski

U.S. District Court (Wyoming)
Defendant Exhibit J
Doc. No. _____

PLAINTIFF'S
EXHIBIT 14

Rawlins, Wyoming
April 9, 1971

Mr. L. D. Foust
1502 Adams Avenue
Cheyenne, Wyoming 82001

Dear Mr. Foust:

With further reference to letter of March 26, 1971 from your Attorney Mr. Edward P. Moriarity in connection with grievance in your behalf.

This is to advise you that I as District Chairman, Seniority District No. 1, am the employee's duly authorized representative to handle initial claims and grievances as per Rule 21, if and when the claims or grievances are presented in writing, stating the nature of the rule violation as per controlling agreement.

As to your claim filed with office on June 17, 1970 relative to your personal on duty injury, I stated to you by telephone at that time, there are no provisions by agreement for filing claims due to medical reasons or injuries under the terms of the present agreement when employee's are withheld from service by Doctors orders, and suggested at that time you engage legal assistance to file your claim for injuries under the terms of the Federal Liability Act, and it is my understanding they withhold employees from service. In practically all the awards, the Adjustment Board has ruled in favor of the Carrier whereas their Doctors have withheld employee's from service due to Medical or injuries.

In conclusion, I wish to make it clear that you can expect full cooperation from this office in assisting your Attorney in any way possible. Furthermore, any misunderstanding relative to our telephone conversation, I nor any other officer of the IBEW have *never* refused to handle any claim or grievance under the terms of the agreements.

Yours truly,
D. F. Jones

D. F. Jones
District Chairman

cc: Mr. Edward P. Moriarity

PLAINTIFF'S
EXHIBIT 15

FEB 21 1979

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-38

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, ET AL.,

v. *Petitioners,*

LERoy FOUST,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS

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Attorneys for Petitioners



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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-38

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, ET AL.,
Petitioners,
v.

LEROY FOUST,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS

I. PUNITIVE DAMAGES ARE NOT A PROPER REMEDY FOR BREACH OF THE DUTY OF FAIR REPRESENTATION UNDER THE RAILWAY LABOR ACT.

A. It is common ground that the Railway Labor Act ("RLA") and the National Labor Relations Act ("NLRA") are "similar" in defining the duty of fair representation which they impose on the collective bar-

gaining agent,¹ and respondent also appears to acknowledge that precedents and policies under the NLRA and the Labor-Management Relations Act of 1947 ("LMRA") provide a sound basis for deciding the remedial issue in this case. But we differ in our understanding of the NLRA law. Specifically, respondent would set aside the NLRA precedents in this Court—insofar as he mentions them at all—by resorting to distinctions which are patently untenable, see pp. 2-3, *infra*, and he places his reliance on a line of cases involving state law remedies for violation of state tort laws, which are plainly inapposite, see p. 4, *infra*.

1. Respondent begins with the assertion that the "differences" between the union's duty to bargain with the employer and its duty of fair representation "are as significant as the differences between day and night". (Resp. Br. 5).² Although the point of the ensuing discussion is not entirely clear, respondent appears to contend that the remedies available against the union to "an individual member of the collective bargaining unit" differ from those available to an employer (*id.*). But § 10 (c) of the NLRA disallows punitive remedies without regard to the identity of the party that committed the unfair labor practice or the victim. Thus, for example, *Carpenters Local v. Labor Board*, 365 U.S. 651, cited at Pet. Br. 14, n. 9, rejected as punitive a dues reimbursement remedy which the NLRB had awarded against a

¹ See Brief for Respondent (hereafter, "Resp. Br.") 3; Brief for Petitioners (hereafter "Pet. Br.") 11-12.

² Resp. Br. pp. 5-6 addresses the standard of union behavior established by the duty of fair representation. The standard declared in the Sixth Circuit case which respondent quotes at length is far more onerous than that declared by several other Courts of Appeals, see p. 9, n. 12 of the Petition for Certiorari. But the "denial of certiorari on that issue concludes any debate as to the definition of the duty and its breach in the instant case." (Resp. Br. 6) By nevertheless dwelling on this point respondent merely beclouds analysis of the issues which are presented.

union in favor of the individual members of the bargaining unit.³

Nor is the NLRA's anti-punitive remedial policy based on any "government-private" distinction as argued at Resp. Br. 12-13. While § 10(c) deals with the authority of the National Labor Relations Board, its language was "construed in harmony with the spirit and remedial purposes of the Act" (*Republic Steel Corp. v. Labor Board*, 311 U.S. 7, 11), and not out of fear of the abuse of governmental power as such. Moreover, when the LMRA established private causes of action, it carried forward the remedial purposes of the NLRA, as this Court held with respect to suits under § 303 in *Teamsters Union v. Morton*, 377 U.S. 252, quoted at Pet. Br. 16-17. *Morton*, of course, involved a "statutory tort" predicated on § 8(b)(4) of the National Labor Relations Act. Any reliance on "traditional tort remedies" (Resp. Br. p. 9) is therefore bootless.

³ Moreover, *Williams v. Pacific Maritime Association*, 421 F.2d 1287 (CA 9), cited at Resp. Br. 13, was not simply a "Member v. Member" suit. Rather, that case, in which the court held that punitive damages would not be available in a duty of fair representation case (*id.* at 1289 and n. 1, citing *Vaca v. Sipes*, 386 U.S. 171; *Republic Steel*, *supra* and *Local 127, etc. v. Brooks Shoe*, 298 F.2d 277 (CA 3)), was one against unions as well as union officers. (See our discussion of *Williams* at Pet. Br. 18-19.) Almost at the very outset, the court expressly refers to "defendant unions". (421 F.2d at 1288.) The Ninth Circuit also noted that, in the District Court, "Defendants moved to strike these claims on the ground that, under federal labor law, no monetary damages may be recovered from individuals based upon their conduct as members or officials of a labor union, and no punitive damages may be recovered from a union or its members and officials based upon union activity." (*Id.*, emphasis added.) See also the more extensive description of the complaint in the court's prior opinion in that litigation, 384 F.2d 935 (CA 9).

The other cases cited at Resp. Br. 13 are also incorrectly described. *Local 57, ILGWU v. NLRB* involved the remedies available to the Board against an employer in favor of the union and employees. *Brooks Shoe* was a breach of contract suit by a union against an employer under § 301 of the LMRA.

2. Respondent invokes the line of authority from *United Automobile Workers v. Russell*, 356 U.S. 644, through *Farmer v. Carpenters*, 430 U.S. 290. As we pointed out at Pet. Br. 23-24, however, those decisions permit the award of punitive damages where the claim grows out of a labor dispute but is based on the *state* law of torts; *Laburnum* and *Russell* rejected, over strong dissent, an argument for uniformity indistinguishable from that advanced at Resp. Br. 11-12. These decisions provide no support for the award of punitive damages as a matter of *federal* labor law for violation of duties created by the NLRA or the RLA. They show instead that, if a uniform remedial scheme had been imposed on the states, punitive damages would have been barred, rather than embraced as respondent urges. For it was understood on both sides of the controversy that the national labor policy disfavors punitive remedies;⁴ the sole controversy concerned the permissible reach of that policy. Indeed, notwithstanding the anti-preemption rulings of *Laburnum* and *Russell*, this Court has repeatedly admonished the states against awarding excessive punitive damages in labor cases, see Pet. Br. 23-24.

3. Respondent draws upon, but misconceives, the holding of *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 "that the substantive law to apply in suits under § 301(a) [of the LMRA] is a federal law which the courts must fashion from the policy of our national labor law," and seizes upon the phrase "judicial inventiveness" in this Court's opinion, *id.* at 457 (see Resp. Br. 6-7, 8).⁵ But "Lincoln Mills did not envision any free-

⁴ See especially *Russell*, 356 U.S. at 646, quoted at Pet. Br. 23, and 356 U.S. at 650-659 (dissenting opinion).

⁵ Three of the cases which are cited as examples of "judicial inventiveness" at Resp. Br. 8-9 rejected punitive damages for breach of the duty of fair representation; those decisions were not the products of the courts' imagination, but of their analysis of the statutory policy and of precedent. See the quotations from those decisions at Pet. Br. 18-19 (*Williams*), Pet. Br. 29, n. 15 (*Brady*) and Pet. Br. 29-30, n. 16 (*Crawford*). The Eighth Circuit's deci-

wheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional pronouncements." *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 255. As the Court observed in *Howard Johnson*, the *Lincoln Mills* opinion "described the process of analysis to be employed" (*id.*) in fashioning the federal common law from the policy of our national labor laws:

The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. (353 U.S. at 457, quoted at 417 U.S. 255-256).

The *Howard Johnson* Court added:

It would be plainly inconsistent with this view to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the courts in a suit under § 301. * * *

The Court thereupon held that the standards which it had developed (primarily on the basis of § 8(d) of the NLRA)

sions cited at Resp. Br. 8 merely assumed "arguendo" that punitive damages might be available in a duty of fair representation suit, see Pet. Br. 30. The other district court cases cited at Resp. Br. 9 did not award punitive damages; they denied motions to strike prayers for such damages, ruling that they might be available. Only the *Sidney Wanzer* case, a breach of contract action, contains any considering analysis of the subject, and the court qualified its conclusion as follows:

Remedies under § 301 must be tailored to the problems which they are invoked to resolve. Thus, even though an award of exemplary damages is an available remedy under § 301, it is not appropriate in most cases. Such an award is extraordinary and should be reserved for those labor-management situations which cannot be pacified by other remedies. (249 F.Supp. 664, 671.)

for determining the rights and duties of successor employers in NLRB proceedings must also be followed by the courts in suits under § 301. Likewise, the federal common law of remedies in suits under § 301 must follow the law declared in § 10(c) and § 303 of the LMRA.

Congress was not attracted by the prospects that the “influence [of punitive damages] can be startling” (Resp. Br. 9), or that a “good dose of punitive damages, not unlike a good dose of castor oil, will stand as a constant reminder for the petitioner and others so situated to take care of their own body.” (Resp. Br. 20) On the contrary, Congress has excluded punitive damages despite their acknowledged utility for deterrence. See *Republic Steel, supra*, 311 U.S. at 11-12, and the other cases quoted at Pet. Br. 15-16.⁶

4. The heart of the matter is that even if “traditional tort remedies have stood the judicial system in good stead” (Resp. Br. 9)—a proposition which is questionable at best, see Pet. Br. 39-44—it is clear that Congress in the NLRA rejected “punitive damages [as] one method by which the policy of the law is carried out” (Resp. Br. 9). In enacting the NLRA and establishing an elaborate and expensive machinery to administer it, Congress unquestionably sought to eradicate the employer misconduct which it there outlawed, but nevertheless refused to authorize punitive sanctions. And when Congress enacted the LMRA in 1947, the legislature was equally concerned in eliminating union unfair labor practices. Yet, Congress did not amend § 10(c) to provide

⁶ What Mr. Justice Harlan wrote for the Court in *Machinists v. Labor Board*, 362 U.S. 411, 428 is very much in point:

It is a commonplace, but one too easily lost sight of, that labor legislation traditionally entails the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The “policy of the Act” is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figured, however weightily, in it.

for punitive damages; nor did it allow them in the civil suits which it provided to remedy union practices thought to be particularly serious and for which a private cause of action was created (§ 303).

In *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 185, the Court declared in the most forceful terms that the Act’s prohibition of anti-union discrimination in hiring—which is a willful violation of employee rights—is central to the entire scheme of the Act.⁷ Yet, in discussing the remedial scheme of the Act, the Court made clear that the discriminatees are to be made whole, but not more than whole.⁸ It would be wholly incongruous to impute to Congress an intent to provide a punitive sanction for breaches of the duty of fair representation which it rejected with regard to discrimination on the basis of union membership, secondary boycotts and jurisdictional strikes.

B. It is clear from the foregoing and pp. 11-24 of our opening brief that the National Labor Relations Act embodies a Congressional policy against punitive damages. If that policy is to be taken as a guide for determining whether punitive damages are available for remedying a breach of the duty of fair representation under the RLA, the punitive damage award in this case may not stand. Nor may it stand if one looks to the RLA alone.

⁷ The Court said (313 U.S. at 185) :

Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which, as we have seen, is recognized as basic to the attainment of industrial peace.

⁸ The Court said (*id.* at 197-198) :

Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred.

Respondent is unable to advance anything to controvert our showing (Pet. Br. 24-28) that such an award against a union for breach of the duty of fair representation would be inconsistent with the policy judgments Congress made in the remedial provision of the RLA, § 2 (Tenth).⁹ The same result follows if the Court adopts the method of construction (developed at Pet. Br. 34-44) from Judge Parker's insight in *United Mine Workers v. Patton*, 211 F.2d 742, 749-750, quoted at Pet. Br. 33-34. Here again, respondent provides no reasoned answer to our contention.¹⁰ And while adoption of that general approach is not necessary to a decision in our favor, that course would provide guidance for the lower courts, which are increasingly called upon to pass on punitive damage requests under a variety of federal statutes.¹¹

⁹ Respondent says only that the discussion of this point in *Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005 (CA 3), *cert. denied*, 434 U.S. 837, was "dicta" (Resp Br. 12). In this Court, however, the worth of a lower court opinion depends not on its authority as precedent, but on the merit of its analysis. Thus, what matters most for present purposes is that the Third Circuit gave thoughtful attention to the problem and provided a reasoned answer, firmly grounded in the statute (see Pet. Br. 24).

¹⁰ Consistent with our view that the answer to the question presented here turns on the particular statutes involved and their legislative history, we have not examined the conclusion that would be reached if the method of interpretation we suggest were applied to statutes not now before the Court. For that reason, we submit that the decisions which allow punitive damages under Title I of the Landrum-Griffin Act, 29 U.S.C. § 411, *et seq.*, cited at Resp. Br. 7, are not in point here and that this is not the occasion to determine whether they were rightly decided.

¹¹ The discussion of punitive damages at Pet. Br. 42-43 is buttressed by the analysis of the Draft Uniform Product Liability Act posed by the Interagency Task Force on Product Liability and Accident Compensation, 43 Fed. Reg. 2996 *et seq.* (Jan. 12, 1979), which was published after we filed our opening brief. The analysis of the section on punitive damages states "Transcending all concerns is the total lack of structure surrounding punitive damages." *Id.* at 3018.

In sum, therefore, it is respondent who "would have this Court undertake a massive rewriting of the statutory scheme of national labor policy as is set forth in the National Labor Relations Act and the Railway Labor Act in order to provide" him with a windfall recovery (cf. Resp. Br. 14).

II. PUNITIVE DAMAGES COULD NOT PROPERLY BE AWARDED ON THIS RECORD.

Respondent errs in attributing to us a concession that we did not properly preserve below our contention that punitive damages could not properly be awarded on this record, even if they are sometimes allowable in RLA fair representation cases (Resp. Br. 15). Our position, that the evidence is inadequate as a matter of law to support an award for punitive damages, was presented below when defendants excepted to the District Court's instruction on punitive damages (A. 68-69) and again on the motion for judgment notwithstanding the verdict (A. 92). The issue that we acknowledged at Pet. Br. 46, n. 35, had not been adequately preserved, and would therefore not be briefed, was that of the union's "responsibility", that is, whether high level officials of the union were sufficiently involved to subject the union to punitive damages on a *respondeat superior* basis.¹²

Respondent also incorrectly states that this Court is being asked to set aside a factual determination on

¹² Our reference there was to the long-standing federal rule which does not allow punitive damages to be awarded against a corporation (or, by extension, against a labor union) on the basis of the misconduct of an ordinary agent. However, a superior officer

actually wielding the whole executive power of the corporation may well be treated as so far representing the corporation and identified with it, that any wanton, malicious or oppressive intent of his, in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself.

Lake Shore & Michigan Southern Railway Co. v. Prentice, 147 U.S. 101, 114. See also, e.g., the early admiralty case, *The Amiable Nancy*, 3 Wheat. (16 U.S.) 546, 558-559.

which the jury and the lower courts are in agreement (Resp. Br. 15). Our position is that the District Court erred as a matter of law in sending the issue to the jury and in failing to set aside the punitive award, and that the Court of Appeals applied the wrong legal standard in affirming the judgment. Respondent's extensive quotation (Resp. Br. 15-18) of the instruction and the court's opinion adds nothing.

Far from adopting "essentially the same" standard as was utilized below for determining whether plaintiff has established a claim for punitive damages, the decisions cited at Resp. Br. 18 support the proposition, stated in one of them, that "[t]he tort must be 'aggravated by evil motive, actual malice, deliberate violence or oppression.'" *Nadar v. Allegheny Airlines, Inc.*, 512 F.2d 527, 539 (C.A. D.C.), quoted more fully at Pet. Br. 48.¹³ While it would unnecessarily extend this reply brief to examine all the lower court decisions cited by respondent, we note that the standard used by the court below differed from that of the Fourth and Eighth Circuits, whose decisions it cited, and that the court below acknowledged its difference with the Eighth Circuit (Pet. 18a).

Thus, respondent's assertion that the Tenth Circuit's standard is within the mainstream of the law is insupportable. And, of course, respondent does not even attempt to show how, on the record of this case, the decision below can be reconciled with *Carey v. Piphus*, 435 U.S. 247, 257, n. 11 (see Pet. Br. 47).

¹³ In *Automobile Workers v. Russell*, the Court stated that Alabama law provides punitive damages "when there is a willful and malicious wrong", 356 U.S. 634; see also paragraph 6 of the jury instruction quoted *id.* at 638, n. 3. Since *Curtis Publishing v. Butts*, 388 U.S. 130, involved an instruction on punitive damages based on Georgia law, we do not see how this case supports respondents's position. The three earlier decisions of this Court cited at Resp. Br. 18 follow the standard of the *Quigley* and *Arms* cases quoted at Pet. Br. 46-47 and 47, n.37.

CONCLUSION

For the foregoing reasons, and those set forth in our opening brief, the judgment of the Court of Appeals should be reversed and the cause remanded to the District Court with directions to reduce the judgment to \$40,000 by eliminating the award of "\$75,000 punitive or exemplary damages" (A. 90).

Respectfully submitted,

LAURENCE J. COHEN
ROBERT D. KURNICK

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Of Counsel
February 1979

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